INDIAN DEPREDATIONS

HEARINGS

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
HOUSE OF REPRESENTATIVES

1908

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COMMITTEE ON INDIAN AFFAIRS,
HOUSE OF REPRESENTATIVES,
Thursday, February 27, 1908.

The committee met this day at 10.45 o'clock a. m., Hon. James S. Sherman (chairman) presiding.

The CHAIRMAN. The order of the day is the consideration of House bills No. 125, No. 3889, No. 7684, No. 11316, and No. 11797, relating to Indian depredations. Who are here to be heard this morning?

Mr. STEPHENS. Mr. Chairman, I wish to say that I abandon House bill No. 125 and substitute House bill No. 11316.

The CHAIRMAN. House bill No. 125 is abandoned and House bill No. 11316 takes its place. Is there objection to laying bill No. 125 on the table? There being no objection it is so ordered, and House bill No. 125 is laid on the table. Now, who is here to be heard?

Mr. LINCOLN B. SMITH, assistant attorney, Department of Justice. Judge Thompson, who is in charge of these cases, is out of town, Mr. Chairman, and I come to represent him in his place.

The CHAIRMAN. What is your name?

Mr. SMITH. Lincoln B. Smith.

The CHAIRMAN. You are against the bills?

Mr. SMITH. No, sir; neither for nor against; but I am here to answer any questions that the committee may desire to ask of me.

The CHAIRMAN. Is there anybody else who desires to be heard?

Mr. STEPHENS. Mr. Garner is here, and he has a bill.

Representative GARNER, of Texas. I simply wanted to call attention to the bill which I introduced, No. 3889.

The CHAIRMAN. I think it would be better to have a hearing on the general subject, and later on, when we get into executive session, we can determine which, if any of these bills, is the one we will consider.

Mr. Robeson, how much time do you require?

Mr. GARNER. The question of citizenship is the only question I wish to be heard on.

The CHAIRMAN. Mr. Robeson, how much time do you wish?

STATEMENT OF MR. WILLIAM H. ROBESON, OF WASHINGTON, D. C.

Mr. ROBESON. I would like to have as much time as you can give me. If the committee gets tired you can stop me. When the committee heard me before they gave me four hours on two days.

The CHAIRMAN. If you can not speak fully and to your satisfaction this morning, you can be permitted to speak again. Gentlemen, Mr. Robeson is a counselor at law, of Washington, D. C., and comes here advocating House bill No. 11316.

Mr. ROBESON. Mr. Chairman and gentlemen of the committee, as early as the year 1796 Congress guaranteed "eventual indemnification" for depredations committed by Indians upon the property of citizens or inhabitants of the United States. That act was renewed in 1802, and it finally was embodied in what is known as the "trade and intercourse act," of June 30, 1834. This trade and intercourse act provided that if any Indian, not in the Indian country, should commit a depredation on the property of any citizen or inhabitant of the United States, that citizen or inhabitant might make application to the President of the United States, who would recommend such action as in his judgment and wisdom seemed proper. That act was repealed by an act of February 28, 1859; but about the same time Congress passed a statute which now forms section 2156 of the Revised Statutes. It is in effect a reenactment of the trade and intercourse act, except as to the guaranty of the United States, providing, however, that the liability of the Indians for depredations to be paid out of their annuities should be continued.

In 1872 the Secretary of the Interior was authorized to examine and investigate claims for Indian depredations which had been filed in his Department, and to make report of his acts thereon to Congress.

Mr. STEPHENS. Can you cite to us the law?

Mr. ROBESON. It is the act of May 29, 1872, found in Seventeenth Statutes at Large, page 190.

In March or April, 1904, this committee did me the kindness to hear me at some length on a similar bill. My associate has here printed copies of this hearing, and I would like the committee to have that before them in the course of this argument. All those acts that I have referred to are set out in the appendix to that printed copy of the hearings.

The CHAIRMAN. Is that a House document?

Mr. ROBESON. No; a hearing before the committee.

The CHAIRMAN. Very good.

Mr. ROBESON. In 1885 still another act was passed, which gave the Secretary of the Interior the power to appoint special agents who should make an independent investigation on the part of the United States, and should take testimony. Upon that testimony the Secretary was to examine the claims, and if he approved them he should allow them in such sum as he judged to be just and report the same to Congress. Under the authority of this last act the Secretary of the Interior examined, approved, and allowed some 700 or 800 acres, which were duly reported to Congress, and some of them paid. In the course of my remarks I shall refer to those as "allowed cases."

In March, 1891, Congress passed the present Indian depredations act, conferring jurisdiction on the Court of Claims in cases of this character. It is directed in the first section of that act that the Court of Claims shall have jurisdiction to hear and adjudicate "all claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for." You will find that in the first supplement to the Revised Statutes of the United States at page 913.

The court was also given authority to pass upon those cases which had been examined, approved, and allowed and reported to Congress

by the Secretary of the Interior. In the act it was provided that where there had been an allowance by the Secretary, unless one or the other party, the claimant or the defendant, elected to reopen the case the duty of the court was limited to rendering a pro forma judgment in the amount found to be due by the Secretary of the Interior.

Under that act these things were necessary: First, that the claimant be a citizen of the United States; second, that the Indians committing the depredation be members of a tribe or band or nation in amity with the United States. And under the decisions of the court it has resulted that the citizenship relates back to the date of the depredation, the decisions being numerous that the claimant must have been a citizen at the time of his loss. It has resulted also in decisions of the Court of Claims, which have been affirmed by the Supreme Court of the United States, declaring the words " in amity " to mean " relations of actual peace."

I should say at this point that in connection with my associate, Mr. Harry Peyton, and the assistant attorney, Mr. Lincoln B. Smith, of the Department of Justice, I also represented the Government in the arguments upon the construction of the act before the Court of Claims; and I claimed, and my associates also, that the words " in amity " were intended to exclude claims for losses occasioned by Indians when engaged in actual warfare. But the Court of Claims did not accept the definition proposed by the Government at that time. It went further and declared that the words " in amity " meant " relations of actual peace."

Between these two definitions you will see there is a very wide difference. We have had some open and notorious wars with the Indians, during which property was destroyed, and such claims as that, under the definition of the Court of Claims, would be properly excluded from the jurisdiction of the court. But when the courts find that the words mean " in relations of actual peace " the committee will see at once the difficulties that might arise respecting the jurisdiction of the Court of Claims and the right of the claimant to recover, because frequently there were no relations at all between the Indians and the United States.

To illustrate: In the Territory of Arizona, where there are many bands of Indians, there is a band known as the Tonto Apaches. History is silent up to 1870 regarding these Tonto Apaches. Possibly an Indian agent out in that country who had never seen a Tonto Apache in his life would include in his reports some reference to them; but between those Indians and the United States there were no relations—neither of actual peace nor war. They were savages; but they took the property of citizens and inhabitants of the United States, who can not recover for their losses because of this definition given by the courts to the words " in amity with the United States."

The bill introduced by Representative Garner, No. 3889, is a bill which goes only to remove the requirement of citizenship. The bill No. 7684, introduced by Mr. Andrews, is a bill which I feel justified in saying Mr. Andrews is willing not to have considered in this connection, inasmuch as he is favoring the bill I am discussing, namely, bill No. 11316. Mr. Andrews also introduced a bill, No. 11797, which is, so far as I can see, an exact duplicate of the bill introduced by Mr. Stephens, the bill No. 11316.

Mr. HACKNEY. The bill No. 11797 is Mr. Andrews's second bill.

The CHAIRMAN. Is there objection to laying on the table House bill No. 7684? If there is no objection, that will be so ordered.

Mr. ROBESON. I have no authority from Mr. Andrews, but I say Mr. Andrews favors this bill. He introduced an exact copy of the bill introduced by Mr. Stephens.

The CHAIRMAN. I understood you to say that Mr. Andrews did not want this bill to be considered. I do not want to lay on the table one of Mr. Andrews's bills without his authorization.

Mr. ROBESON. I should not wish to do that without Mr. Andrews's knowledge.

The CHAIRMAN. Very well, then; what we did a moment ago will be expunged from the record.

Mr. ROBESON. The first section of the House bill No. 11316 is in these words, after the enacting clause conferring jurisdiction on the Court of Claims:

First. All claims for property of citizens of the United States, or inhabitants thereof who have since become, or shall hereafter become, or whose heirs are or shall hereafter become, citizens of the United States, taken or destroyed within the limits of the United States by Indians belonging to any tribe or nation subject to the jurisdiction of the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for; and the alienage of the claimant, provided he is or may hereafter become a citizen, or the alienage of his heirs, provided they are or may hereafter become citizens of the United States, or the want of amity of the defendant Indians, shall not be a defense to said claim.

This bill provides, therefore, first for inhabitants. Now, gentlemen of the committee, the word "inhabitants" never left the law from 1796 down to the passage of this act of March 3, 1891. From 1796 on down this promise has been made to inhabitants as well as to citizens, and why not? Why was the promise made at all? We had our western country in 1834. It was not settled. In 1796 the western country was what is now in the effete East. We wanted that country settled, so we proposed to afford protection to those people who would go out into that country and settle and develop it. Were there fewer reasons to make such a proposition to an inhabitant than to a citizen? Congress thought not, because in every one of these acts from 1796 to 1891 the promise of indemnification was made to inhabitants as well as to citizens.

Let me give you some illustrations: Henry H. Woodward, an Englishman, came to Oregon in the late forties. In the various wars that disturbed that State up to 1856 that man served as a faithful soldier of the United States. He declared his intention to become a citizen of the United States soon after reaching Oregon. He has lived continuously in the town of Roseburg, and is an honored citizen of that town. He lost some property out there. He has voted continuously. He was not a citizen of the United States when the loss of his property occurred, and is therefore denied a recovery.

When we acquired the republic of Texas, we ought to have taken into the citizenship of the United States every person who came in by the act of annexation, but we did not do it. The republic of Texas had declared in a statute that every person residing in Texas at the time of the adoption of the constitution in 1836 should be considered a citizen of the State; but it had also its scheme of naturalization, so that when we took over Texas, only those persons resident at the time of the adoption of that constitution of 1836 and those who took ad-

vantage of the naturalization laws became citizens of the United States. John N. Gauney, a resident of the town of San Saba, served in the navy of the republic of Texas. He came over, of course, with the State of Texas into the United States. He was elected for five terms of four years each as county clerk of his county; never has failed to cast his vote; has always been a revered citizen of that community. He was not in Texas at the time of the adoption of the constitution. He never availed himself of the naturalization laws, and his service in the navy of Texas, which service of course contributed to our interest, conferred upon him no right to prosecute a claim that he had against Indians for depredations in Texas, and he can not recover under the law.

Michael J. Daley, an Irishman, lives in South Dakota, at Rapid City. He has been a member of the South Dakota legislature and helped to elect her Senators. He has held county offices, and is a respected citizen. I went to him on one occasion to take his deposition, and I said, "I suppose you have not become a citizen?" He handed me triumphantly, not a certified copy of the decree admitting him to citizenship, but a copy of the declaration of his intention to become a citizen of the United States. He had supposed all the time that that document established his citizenship; but he can not recover for his property taken by Indians, because of the interpretation of the act referred to.

John G. Campbell was a Delegate to the House of Representatives from the Territory of Arizona. He came to this country at an early age with his parents and was raised in New York. He testified that his father had been naturalized when he himself was but 14 years old. It was part of the family history. But in the abundant records of the State of New York I can find no record of his naturalization. The family removed to Arizona. Campbell was elected a Delegate to the House of Representatives of the United States; he died five years ago, and now his wife can not recover, because she can not establish the fact that the father of her husband was a naturalized citizen. Here is bill 4657, pending in behalf of his heirs. If I were a member of this committee, I would see to it that John G. Campbell's wife is paid for the depredations committed upon her husband's property.

The CHAIRMAN. How did it happen that Mr. Campbell did not make his claim before the law was changed?

Mr. ROBESON. I do not know why that was.

The CHAIRMAN. How many years was it after the depredation before the law was changed?

Mr. ROBESON. I should say that Mr. Campbell lost his property, according to my recollection, about 1881. I will ascertain.

The CHAIRMAN. So that for ten years he had opportunity to file his claim and did not.

Mr. HARRY PEYTON. From 1859 to 1891 the promise of "eventual indemnification" by the Government was not in force, and there was no promise on the part of the Government to pay for the depredations except from the tribal funds of the Indians.

Mr. ROBESON. The act passed in 1872 and the act passed in 1885 authorized the Secretary to make investigation of claims; but, in the first place, that there was an existing law of that kind was something not generally known, as is evidenced by the fact that out of

10,841 cases filed in court not more than half of them had been presented to the Secretary of the Interior.

The CHAIRMAN. I want to clear this up. I have not a clear understanding of what Mr. Peyton means. I understood you [addressing Mr. Robeson] to say that from back in the eighteenth century down to 1891 a man who was an inhabitant could at all times have recovered, and I understood Mr. Peyton to say that was not so.

Mr. ROBESON. He said there was no forum in which to present his claim. The guaranty was not continued down to 1891, but was repealed by the act of February 28, 1859. (Sec. 2156, Revised Statutes.) Yet an inhabitant, equally with a citizen, could have presented a claim against Indians alone.

The CHAIRMAN. From 1796 down to 1891 was there no forum before which he could have presented his claim?

Mr. ROBESON. He could have presented it to Congress or to the Department of the Interior against the Indians alone—not against the United States.

The CHAIRMAN. And he did neither?

Mr. ROBESON. No. The law provides that if the right of action accrued or the loss occurred prior to July 1, 1865, the Court of Claims should be without jurisdiction unless the claim had been filed before Congress or the Interior Department or before some agent or some subagent or superintendent or person or tribunal having power and authority to consider claims of that kind. But if the depredation occurred after July 1, 1865, then nothing is to be presumed against the claimant by reason of his failure to seek relief through Congress or the Department or the various officials of the Government charged with the examination of cases of this kind.

Now, it should be added here that if Mr. Campbell was as well informed as I presume a man who came here as Delegate from Arizona was he would have known that claims of that kind had been pending before Congress and the Department and before agents for many years without practical results.

The CHAIRMAN. In what year was Mr. Campbell a Delegate?

Mr. ROBESON. I can not find it.

Mr. STEPHENS. I think he was the first Delegate. Mr. Marcus Aurelius Smith, I think, told me that a few days ago.

Mr. MORSE. May I ask a question, whether there were any depredations subsequent to 1891?

Mr. ROBESON. Not at all. Those are expressly excluded from the consideration of the Court of Claims or anybody else. The Secretary of the Interior was directed by the act of 1891 to cease his examination of such claims.

Mr. STEPHENS. Are you acquainted with the case of Judge Lynch?

Mr. ROBESON. Yes, perfectly. You have reminded me to say to the committee that, through Mr. Stephens and Mr. Mondell and Senators Warren and Culberson and others, Congress has passed for clients whom I have represented six or seven bills removing the requirement of citizenship and permitting the Court of Claims to assume jurisdiction and award judgment; and in all the cases but one judgment has been awarded. In the case of Mr. Lynch, to which Mr. Stephens has referred, he testified that he was a citizen of the United States by

naturalization, but in swimming a stream he lost his saddle-bags in which were his papers, and he was unable to find the record anywhere of his admission to naturalization.

August Trabing, a citizen of Wyoming, served faithfully in the Army of the United States in an humble capacity, but he had never been naturalized, and Congress removed the requirement of citizenship for him, and permitted the Court of Claims to assume jurisdiction.

There is a bill now pending before Congress for the removal also of the requirement of citizenship of Fred Metzger, a United States soldier, in which case we give reasons why this requirement should be removed. I have never yet met with decided opposition to a bill of that character. When I came to the last Congress and asked for the relief of John G. Campbell—which unfortunately is not before this committee, because every bill filed here for the removal of the requirement of citizenship has been passed——

The CHAIRMAN. It appears that Mr. Campbell was a Delegate from Arizona in the Forty-sixth Congress. He must have been elected in 1878, so that this depredation occurred after Mr. Campbell was a Delegate.

Mr. ROBESON. I think it occurred in the difficulties of 1881.

Now, if I may, I would like the committee to look at the first page of this House bill 11316, and you will observe that in the twelfth and thirteenth lines this language occurs, "by Indians belonging to any tribe or nation subject to the jurisdiction of the United States." In the act as it at present stands, before the word "tribe" appears the word "band." This act I am advocating purposely omits the word "band."

The Sioux Indians number about 40,000 souls. They are a great people and we treat with them, and have done so for many years as a "nation." The Navajo Indians number about 17,000 souls. Being of smaller numbers, we have also treated with them, and designated them as a "tribe." In the States of Washington and Oregon there are perhaps thirty or forty different bodies of Indians maintaining a separate and independent existence, but, being few in number, we have always called them "bands." Now, in the average mind when Congress writes into a law a provision that there shall be recovered for depredations committed by a band, tribe, or nation, there is the natural presumption that it was the intention of Congress to provide for the recovery against Indians belonging to any aggregation, and that by the words "tribe, band, or nation" Congress was attempting to describe simply the body of Indians according to its dignity. That seemed to me to be a very fair argument, and it was made to the Court of Claims until it was discovered on the hearings here in 1904 that some person had—I do not like to say surreptitiously, but it is the only word that will express my idea—written into the law as recommended by the House and Senate conference committee the word "band." In proof of that I have the Record here of February 28, 1891, containing the conference report on the bill which afterwards became known as the act of March 3, 1891. That conference report is signed on the part of the House by Binger Hermann, B. W. Perkins, and Silas Hare, and on the part of the Senate by G. C. Moody, A. C. Pad-

dock, and Charles J. Faulkner. In that conference report, as will be seen from that Record, it is provided:

First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any tribe or nation in amity with the United States, without just cause and provocation on the part of the owner or agent in charge, and not returned or paid for.

Now, the use of the word "band" will not seem significant to you until I tell the members of the committee the result.

The CHAIRMAN. Right there, let me ask you whether you have investigated further than the mere face of the Record. Have you looked up in the files of the House the original of that conference report to ascertain whether or not this was a typographical error in the Record?

Mr. ROBESON. I have not had opportunity.

I am reading from page 12 of the former hearing, where you will notice Mr. Hermann and I engaged in a colloquy, and he said the word "band" was not in the act as agreed upon by the conference committee, as will be seen by a reference to the Congressional Record, part 4, volume 22, Fifty-first Congress, second session, at the top of page 3544, first column, where the bill is reported by the conference committee in the Senate, and in the same volume on page 3592, the middle of the first column, where the bill was reported by the conference committee to the House.

In neither of these does the word "band" appear. Until this act of 1891 was passed the words "band" and "nation" had not appeared in any act. Every act from 1796 down to March 3, 1891, provided for the recovery for depredations committed by Indians belonging to any "tribe."

Now, I want the committee to understand what this word "band" means, according to the courts. It means that a little handful of Indians, taken perhaps from different tribes, renegades, outcasts from their fellows, could get together under the lead of some man acting as head or chief, and commit depredations, and if they themselves committed any act which was hostile, one that denoted a lack of peaceful relations with the United States, it was a "band" within the meaning of this act, and although the tribe to which the individual members belonged was "in relations of actual peace" with the United States at the time, no recovery could be had.

See to what absurd results those decisions have led us. In a case against the Cheyenne Indians there was a band known as Black Kettle's band. At that time the Cheyenne tribe was in amity with the United States, Black Kettle had gone to Fort Lyon and had put himself under the protection of the American flag. Instead of keeping his people at the post, they sent him to Sand Creek, Colorado, some 20 or 30 miles away, and told him to keep his people there. John M. Chivington, a minister of Denver, there being considerable feeling against other Indians engaged in killing and taking property, organized a body of 100 day men, and they went by way of this post from which Black Kettle had been sent by the officer in command. Knowing that he had claimed the protection of the flag, they nevertheless marched down on his unprotected camp. When he saw them coming Black Kettle put up the Stars and Stripes at the top of his tepee; but in spite of that, the soldiers came and almost annihi-

lated the band. Some members of the band escaped and committed depredations. They had to live upon the country.

Now the Cheyenne tribe at that time was in amity with the United States, and Black Kettle's band belonged to it. But the courts held that Black Kettle's band was hostile, not in relations of actual peace, and though he belonged to a tribe that was in amity with the United States, no recovery could be had. When I came to prosecute cases of that character it occurred to me that if that decision was right, the converse of it was true, namely, that though the tribe itself was hostile, if the band by which the depredation was committed was in amity, there should be a recovery against the tribe. In the case of Salois *v.* The United States, reported in 33 Court of Claims at page 326, the facts were these: In 1876, as all of us know, Custer and his band were killed on the Little Big Horn, Wyoming. Practically all the bands of Sioux in the States of South Dakota and Wyoming were at war with the United States, but there remained at the various agencies parties of Indians who did not go to war and who were known as "Loafer Indians." They were free to commit depredations, and they did destroy a good deal of property. In this case I claimed that the court must consider the status of this band, and if it was in amity the duty of the court was to award judgment; and they awarded it, with the result following from it that, though this act of 1891 declares that the tribe must be in amity, I have secured judgments against a tribe not in amity with the United States for depredations committed by a little, insignificant band of that tribe which was in amity with the United States, thereby in part nullifying the law.

Now we want the word "band" out. At the close of the difficulties of 1876 Dull Knife's band of Cheyennes, which formed merely a family of Cheyennes, and two other bands were sent down to the Indian Territory from South Dakota. The Government desired to separate the Indians as widely as possible. Accordingly, they sent this band to the Indian Territory, where, under the unaccustomed conditions of climate and water and soil, the women and children of the band sickened and died like sheep. Dull Knife implored the authorities of the Government to let him go back to his people; but, with the usual unwisdom that characterized our treatment of half-savage Indians, they kept him there until his band became almost decimated. He endured it as long as he could, but one morning when the soldiers came out no sign was seen of Dull Knife's band. The soldiers were summoned and started on the trail, and they overtook Dull Knife's band somewhere in the State of Kansas. They held a parley. Dull Knife said, "I have no war with your people. My people can not live in the Indian Territory. My women and children are dying. Let us alone." The answer of the troops was to fire upon them, which fire, of course, was returned by the Indians; and then ensued, gentlemen of the committee, one of the greatest running fights ever made. It is part of the history of the States of Kansas and Nebraska. The Indians were finally surrounded and put in a stockade at Fort Robinson, in the dead cold of winter, with snow on the ground, for five days without fuel, fire, or food. Driven to desperation, they broke out from the stockade, and started again, straight as the crow flies, to their old home. The soldiers again sur-

rounded them and, with the exception, I believe, of three persons, killed all of them—men, women and children.

Now, when these Indians were attacked they had to throw away their impedimenta and subsist as well as they could on the country. They took perhaps $15,000 worth of property from the citizens of Kansas and Nebraska; and those citizens are denied judgment because that band of Dull Knife's was not in amity with the United States. That case was taken to the Supreme Court and the Supreme Court affirmed the judgment of the court below, but concluded its decision with the suggestion that Congress ought to look after these citizens and inhabitants who had suffered in the progress of that flight of Dull Knife's.

There is a similar case in New Mexico. The Mescalero Apaches were in amity with the United States. Victorio, a chief, in 1879 gathered around him the turbulent spirits of those tribes, a few from this tribe and a few from that; and the court held that was a "band" within the meaning of the act, and there could be no recovery for depredations committed by its members. That case was tried in the Supreme Court at the same time with the other case of Dull Knife, and the Supreme Court affirmed the judgment of the Court of Claims.

If this word "band" was never in the acts prior to this time, the act violates the promises made to our people that if the Indians were the members of a tribe in amity with the United States we should be reimbursed, and it ought to be stricken out here in order that the promise made in 1796, and repeated so many times, shall be faithfully kept.

This bill in the first section would also remove the requirement of amity. I have already explained to the committee that the courts hold that the words "in amity" must be taken to mean "relations of actual peace," and I have said that it is very difficult in many cases to show that the Indians were in actual relations of peace. The Court of Claims has held that the existence of a treaty and continued recognition of the same by the Executive Departments is not conclusive of the amity of the Indians. All of us know how, when the Government is assailed in any jurisdiction, if it can find that there exists an executive construction of a certain act, it will offer as one of its most weighty arguments the fact of the long-continued departmental construction of that act in some way; and it is a very useful and a very persuasive argument to make in behalf of the Government. Now, the Court of Claims has said, no matter what the conditions are, it matters not if the executive department has recognized a treaty as continuing and synonymous of amity, and though there has been no break in the recognition of the treaty, it still is not conclusive of the fact that the Indians were in amity on a particular date with the United States. It has held that engagements with troops are unnecessary. It has held that hostilities with the settlers establish a state of war, and it has held that the cause of the hostilities is immaterial.

I believe that the last holding is right under the act of March 3, 1891; but I believe that we ought not to make the requirement that the Indians must have been in relations of actual peace; and I know from conferences with at least two members of the conference committee on the part of the House and on the part of the Senate that the House and Senate never intended to make any such requirement by the use of such words. In a memorandum, which I desire to file,

I have made references to the various decisions of the court on this subject of amity.

It is almost impossible for me to understand how there could have been a lack of amity between an Indian tribe and the United States. From the days of John Marshall down to this hour they have been declared to be "domestic dependent nations," "wards of the Government;" and no Supreme Court since the day of Marshall has found cause or occasion to change this definition of the status of Indians. I want to know how it can be that our Indian wards could ever be hostile to the United States; how they could ever be out of relations of actual peace; and I want to know if the Government did not owe it to its citizens and inhabitants to protect them against Indians, when the Indians did not occupy relations of actual peace toward the United States. This is a matter that has been discussed before this committee previously and before the Senate committee; and whenever there has been opposition to the removal of these words, and the opposing member of the committee is asked to state his reasons for his opposition, it is this: "It is the well-established policy of the Government not to answer for damages occasioned by the enemy in time of war." It is a very well-established principle, applicable to the relations between independent sovereigns; but we are dealing with "dependent, domestic nations," "wards of the Government," and when we come to deal with them directly, we never for a moment consider any theory which would be applicable as between independent nations.

For instance, our courts have declared time and time again that a statute may supersede a treaty with Indians, just as a treaty may supersede a statute.

Our Supreme Court has decided that though we promised Lone Wolf and his band of Kiowas and Comanches that they should possess their lands forever, the Government, without a treaty and without an offer to treat, had the right to take their lands and divide them and sell them to citizens of the United States.

We promised the Ogallalla Sioux and their chief, Red Cloud, that they should enjoy their vast territory, now in South Dakota and Wyoming, forever and ever; but, without an offer to treat with them, we started to open the Bozeman Road, with the result that Red Cloud and his Ogallalla Sioux went on the warpath, and for the first time in the history of the United States the Indians whipped us. That was in 1866, when the command of Fetterman and his troops were annihilated.

We do not treat with the Indians as independent sovereignties, but as our wards. We announced by an act of 1870 that we would make no more treaties with them. We assume to act for the benefit of the Indians, and in some instances I have no doubt we succeed; but when it comes to a claim of a citizen of the United States, or an inhabitant who has helped to develop the country, for reimbursement of losses occasioned by Indians, you would qualify his rights by the adoption of a theory applicable only as between independent sovereignties, that we will not pay for damages occasioned by the enemy in time of war, and made applicable to our relations with Indians only when some pioneer asks relief.

But let us see if that theory would be applicable if the Indians were independent sovereigns. According to the act of March 3,

1891, under which we are now proceeding, these judgments are chargeable to the Indian tribes. I may as well say to the committee that the Indian tribes do not pay these judgments; that the money is paid out of the Treasury of the United States. It is charged up to the Indian tribes, I suppose, as a matter of bookkeeping in the Treasury Department, but as a fact the United States pays them. The United States assumes the position of surety, or guarantor, and declares itself as secondarily liable. And the Indians, as the courts have decided, are primarily liable. Where, then, is there room for the application for the theory? We are making the enemy pay for damages occasioned by him during war, and as between so-called independent sovereignties we do that. We did not do it with Spain, but it is not because we could not have done so. It is the tribute the vanquished pays to the victor, to answer for damages in war; so that if we take the theory that the enemy itself is to pay the damages caused by war, we are violating no well-established principle or policy of the Government.

Now, let me dispose of certain propositions in this bill.

Mr. HACKNEY. If we should repeal that, under the provisions of this bill would that open up claims under the Black Hawk war and other old wars?

Mr. ROBESON. No. No new suits can be instituted after March 3, 1894, and there are no Black Hawk war claims; nor would it open up the Creek claims in Alabama, because the court, instead of dismissing those cases for want of amity, declared that we had granted amnesty to that tribe.

Mr. HACKNEY. Is there anything in the bill that would exclude those claims, or is there anything in existing law or the law as amended that would exclude them?

Mr. ROBESON. Yes. That is the trouble with the existing law. It not only includes——

Mr. HACKNEY. If you amend this law as you ask that it be done, would there be anything there to keep out these claims prior to 1865, prior to the civil war?

Mr. ROBESON. No. If they were pending in the Court of Claims they would not be cut out.

The CHAIRMAN. This bill, Mr. Hackney, as I understand Mr. Robeson, limits the jurisdiction to the claims already filed.

Mr. ROBESON. There are no claims that arose out of the Black Hawk war. There are a few that originated out of the Creek war, but they are excluded, as I have said, by reason of the amnesty granted to those tribes. The original act——

Mr. MORSE. Where are the limitations to the claims already filed in this act?

Mr. ROBESON. It is in the act of March 3, 1891.

Mr. HACKNEY. That section would not be affected by this bill?

Mr. ROBESON. It would not be affected by it at all. In further answer to Mr. Hackney I will state that section 13 of the act of March 3, 1891, provides—

That the investigations and examinations, under the provisions of the four acts of Congress heretofore in force, of Indian depredation claims, shall cease on the taking effect of this act.

Mr. HACKNEY. Section 4 of the bill H. R. 11316 is the limitation?

Mr. ROBESON. Yes; and by section 4 it is provided—

That any claim now pending in the Court of Claims for a loss which occurred prior to July 1, 1865, shall be within the jurisdiction of the Court of Claims, provided application was made by the claimant or any personal representative or any of his heirs, on account of such loss, to the Secretary of of the Interior or the Congress of the United States, or before any superintendent, agent, subagent, commission, or commissioner authorized under any act of Congress to inquire into such claims; and that such claims shall be considered pending within the meaning of the act of March 3, 1891, and if the claim was made either in the form of a verified application or by affidavit of the claimant or any other person.

Mr. STEPHENS. You will find a clause pertaining to claims not filed within three years from the passage of the act.

Mr. ROBESON. Yes. Section 2 of the act of 1891 provides the time for the bringing of suits in the court should expire three years from the date of the passage of the act, namely, on March 3, 1894.

Mr. STEPHENS. Mr. Robeson, can we inquire how many cases will be affected by this?

Mr. ROBESON. I have reserved that for a moment, because I have got to go into some figures, and wish to dispose of some minor amendments first.

It is provided by section 3 of this act of March 3, 1891—

That all claims shall be presented to the court by petition setting forth in ordinary and concise language, without unnecessary repetition, the facts upon which such claims are based, the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committed, as near as may be.

It is provided in section 4——

Mr. HITCHCOCK. I do not quite understand, Mr. Robeson, what the limitation is on the filing of these claims. Do you mean to say that the passage of this bill would enable the bringing of any suit that had not been brought heretofore.

Mr. ROBESON. I mean to say that it will not. The court is not reopened for that purpose.

Mr. HITCHCOCK. Suppose a man had not been a citizen. This would not enable him to bring suit, would it?

Mr. ROBESON. No; I do not think the courts ought to be reopened to the filing of new claims, but it would be a matter of intense gratification to me if it could be done. Yet, abundant time was given in which to file these claims, and independent of any partisan position I may occupy with respect to these claims, I believe no others should be filed.

Mr. HITCHCOCK. Suppose a man could not file a claim because he was not a citizen, or his progenitor was not a citizen?

Mr. ROBESON. That is his misfortune.

Mr. HITCHCOCK. This would not propose to remedy Mr. Garner's bill, then?

The CHAIRMAN. It would depend on whether the beneficiary under Mr. Garner's bill had already filed his claim.

Mr. ROBESON. No one knew at the time of the passage of this law to what time the courts might ultimately decide that citizenship related, whether they must be citizens at the time of the award of judgment, or citizens at the time of filing the petitions, or citizens at the date of the depredations.

Mr. HITCHCOCK. This bill refers only to those who filed claims and were unsuccessful?

Mr. ROBESON. Yes, sir.

Mr. HOWELL. When did the Supreme Court decide the questions growing out of this act of 1891?

Mr. ROBESON. There have been many decisions. I will come to that in a moment.

Mr. MORSE. Wherein is the equity of this thing? Here are a lot of people who had no right to file claims under the law who did file them, and then there was a lot more who knew the law, and you do not propose to do anything for those people. Am I right? Where is the equity of that?

Mr. ROBESON. I do not think there was anybody that knew to what time citizenship related.

Mr. MORSE. They may have guessed the right construction.

Mr. ROBESON. The Court of Claims has decided that a particular band was in relations of amity, and when the question is presented they have occasionally reversed themselves. Tell me how, under those conditions, you would know whether the Indians were hostile or in amity with the United States?

The CHAIRMAN. That does not involve the question of citizenship. That is what Mr. Morse is getting at. Under this bill you propose, because of the promise held out in the old act, to open the door to certain people and to close it to other people.

Mr. ROBESON. No. I simply propose to say to these people who have come in under this act and filed their claims within the time prescribed by the law, that they shall be permitted to prosecute their claims if the only objection be that they were not citizens of the United States. I say that those who were not citizens of the United States and did not bring suit do not occupy the same position. Many of these people came in, doubtless, not knowing that the court would make the citizenship relate back to the date of the depredations. They have proved their cases in many instances, but were denied judgment because they were not citizens. You can say, "Why not open the door and let people come in who might have withheld their claims from filing because they believed the Indians were not in amity with the United States?" They did not know anything about it, and nobody knew until the Court of Claims began to give its decisions; and when I tell you that the Court of Claims has more than once changed its opinion as to whether the Indians were in amity with the United States, you can see how difficult it is for the average man to determine what the decisions would be as to either citizenship or amity. I would like to see this reopened. If you say you want to regard the rights of all our people I would join most heartily with you in advocating the passage of such a bill. But I have never known a case where Congress gave three years' limitation, and afterwards extended the time. If I were on the committee I would not vote for it.

Mr. LINDBERGH. Could anybody file within those three years, irrespective of citizenship?

Mr. ROBESON. Yes. I think some four or five hundred people, who are not citizens, did file claims.

Mr. SLAYDEN. Mr. Robeson, is it not true that you have innumerable instances in mind. and know of them, where people filed their

claims during the three years under the impression that they were citizens, and who found out afterwards that they were not?

Mr. ROBESON. Yes. I mentioned a case a moment ago of a man who thought his declaration of intention was a proof of his citizenship. A man who served in the Army of the United States does not know, as a rule, that his service in the Army is a mere substitute for a declaration of intention. He thinks such service accomplishes his citizenship.

Mr. MORSE. Here are two men, for example, living side by side, each suffering from a depredation, one thinking he is a citizen, and the other believing he is not, and one files a claim and the other does not. Where is the equity in allowing the one to file and the other not?

Mr. ROBESON. The one showed diligence, and the other did not. There were, let us suppose, two men, both of whom knew they were not citizens. One of them may say, "I was not a citizen at the time of the date of the depredation, but I am a citizen now. . The law says these are claims for loss of property by citizens of the United States. I am a citizen now, and I will file my claim." Now, I say that man has shown greater diligence than the other man who, knowing he was not a citizen at the time of the depredation, failed or omitted to file a claim.

The CHAIRMAN. Besides that, Mr. Robeson, there was a limitation of three years, so that if a man had simply declared his intention to become a citizen, he had time enough to take out his papers and file his claim before the expiration of the three years?

Mr. ROBESON. Yes.

Mr. HITCHCOCK. I can not see that that adds any merit or virtue to the man. It seems to me the question is whether it is safe to open the doors so wide as to admit a lot of new claims at this time. I can not see that the man who has suffered depredations deserves any better attention from the Government because he afterwards pleads his application for citizenship than the man who has suffered an equal depredation who has failed to avail of his declaration or application. But I can see why this committee should not open up the field to all these claims, some of which may not be good, even though others are good.

COMMITTEE ON INDIAN AFFAIRS,
HOUSE OF REPRESENTATIVES,
Wednesday, March 4, 1908.

The committee met at 10.30 a. m., Hon. James S. Sherman, chairman, presiding.

STATEMENT OF MR. WILLIAM H. ROBESON—Continued.

The CHAIRMAN. Mr. Robeson will resume his statement.

Mr. ROBESON. Mr. Chairman and gentlemen of the committee, with your consent, I wish to address you first upon section 2 of this bill, No. 11316. The committee will observe that section 2 provides that in any suit under the act of March 3, 1891, where the defendant tribe is not designated correctly, the petition may be amended so as to

designate correctly the tribe of Indians shown by the evidence to have committed the depredation.

Mr. HINSHAW. That is, provided notice be given?

Mr. ROBESON. No; I will tell you what the courts have decided. You will understand that the original act provided that the claimant should designate the tribe committing the depredation "as near as may be," and directed the Court of Claims to award judgment against the United States and the tribe of Indians when the tribe could be identified. By the use of the words "as near as may be" and the direction to the court to award judgment against the tribe when it could be identified, it seems that this could be done by amendment at any time before judgment was rendered.

The Court of Claims held, in an opinion delivered in the case of Duran, which I have referred to in my brief, that such amendment as to parties defendant could be made at any time, and the defendant acquiesced in that decision for seven years, during which time a number of such amendments were made. The effect of that decision was that if a man had a suit in which the depredations were said to have been committed by the Utes and it afterwards developed that they were committed by the Kiowas, the courts permitted an amendment bringing in the Kiowas and awarded judgment accordingly.

The act of March 3, 1891, provided that all suits should be brought within three years. The personnel of the court having changed, this opinion in the Duran case was criticised as having gone too far. Appeal was taken to the Supreme Court of the United States to determine the question whether or not the amendment naming the tribe really guilty could be made after the 3d of March, 1894, the theory being that the Indians committing the depredation had to be named as defendants originally; if not, to bring in another tribe as defendants after March 3, 1894, was, in effect, to bring a new suit.

The Supreme Court decided that amendment could not be permitted, for the reason just given. There was a strong dissenting opinion by Justices White and McKenna, who were unable to harmonize this decision with a unanimous decision in another cause wherein the Comanches were named as defendants, but the proof did not identify them as Comanches and did not identify them as members of any tribe. A decision was awarded against the United States alone. The case went to the Supreme Court, which affirmed the judgment of the Court of Claims. I ought to say, with all due respect to our highest judicial tribunal, that the court could not have rendered such a decision except upon the theory that the Indians were necessary parties to the suit.

Now, I say that the use of the words "as near as may be" gave to the Court of Claims the right to allow the claimant to name the guilty tribe at any time before judgment, for otherwise those words are without reason. If that be not true, there is no need for the words "as near as may be."

Let us see what an impossible task it is to set for claimants to have named accurately the tribe to which the thieves belonged.

Near the line between Nevada and Oregon once lived or roamed the Utes, Paiutes, Bannocks, Nez Percés, Snakes, Shoshones, Modocs, and other smaller tribes—all in one common country. All these tribes were given to depredations.

On a dark night the horses are uneasy in their stables, and the barking dogs run under the porch and whine, and you know from these indications that Indians are about. You find, in the morning, moccasin tracks at your barn; you miss your horses, and you follow a trail made by Indians riding single file and driving before them your horses, which, being shod, are easily followed by their tracks. The trail reaches the Indian country into which you are forbidden, by law, to go. You know they were taken by Indians, but by what Indians, God only knows. Do you think that Congress, when it enacted that law, had in mind that you should actually and correctly describe those Indians? If it was so intended why did it use the words "as near as may be?" Is it right and fair to hold out promises of recovery in these depredation cases and to add such an unreasonable a condition as this? It is impossible to identify the tribe to which most of these Indians belonged, because it was in the darkness of night that depredations were committed, or in the day when witnesses are not present. If you knew the different tribes, you could not tell them in the night. You could not distinguish the members of one tribe from another. I ask the members of this committee whether that is a fair and reasonable construction to be put upon that provision of the act. Yet, as the Supreme Court has so construed it, we ought now to provide against the hardships that decision occasions.

Mr. STEPHENS. Such things have occurred. There was a case in New Mexico where two Indians, one a Comanche and the other a Kiowa, committed some depredations, and it was impossible to tell to which tribe they belonged.

Mr. ROBESON. To illustrate that, I would mention a case which occurred in Mr. Slayden's district, in the valley of the San Saba River. In 1865 some 50 or 60 cattlemen went there and took their families, settling throughout the whole valley. On the 8th of August of that year 200 Indians came down the valley and drove out of the country cattle to the number of 15,000 to 25,000 in one day. As a result of that raid there were 53 claims filed. Of that number, 17 of the claimants alleged that the Indians were Apaches; 29 alleged that the Indians were Comanches; 2 of the claimants alleged that the Indians were Kickapoos. Some of the claimants said that the Indians were Apaches and Kiowas. I was satisfied that the depredations were committed by the Kiowas, Comanches, and Apaches, and it was so proved and decided, the court holding that the raid was committed by the confederated Comanches, Kiowas, and Apaches. Where the claimant had named Apaches, judgment was rendered against the Apaches; where they had named the Comanches, judgments were rendered against the Comanches; so with the Kiowas; but where the claimants named the Kickapoos the petitions were dismissed, because the proof did not inculpate any member of that tribe, and the two men who attributed their losses in that raid to the Kickapoos lost their claims, while the remaining claimants were given judgment against the other tribes, and their money has been paid according to the judgments. I submit to my friend, Mr. Morse, that furnishes an illustration of the hardship of that construction of the law, which is unparalleled.

In this case 51 claimants recovered and 2 did not, because they did not correctly name the tribe of Indians engaged in taking the cattle.

Mr. MORSE. Why should the Government reimburse those people any more than it should reimburse people who had suffered outrages at the hands of anarchists through dynamite outrages?

Mr. ROBESON. If this Government should pass a law providing for the protection of life and property in the town of Paterson, N. J., and should send me there to visit a nest of anarchists in that town under a legislative guaranty against personal injury or loss of property, and I should, in the discharge of my duty, suffer loss of property or injury, I would confidently expect Congress to reimburse me. It was under a repeated guaranty that the pioneers removed to the western country.

I want to say a word or two more, and then return to the question of citizenship and amity.

Section 3 of the bill provides that any petition heretofore filed under said act of March 3, 1891, by any party in interest, who was not the sole owner of the property, may be amended so as to bring in as parties plaintiff all the parties in interest.

There was a case from New Mexico where the owner of property having died, the eldest son, according to the old Spanish law of primogeniture, instituted suit in his own name. That was done at the instance of the other heirs. He was not permitted to amend, and the petition was dismissed.

Another instance was that of one partner, who brought suit in his own name on account of the loss of partnership property. There being no fraudulent purpose in the filing of the claim, the court allowed an amendment, naming all the partners as claimants. It has been decided that petitions might be amended so that the name of an administrator might be put in. There was a notable case, that of Mary Thomas, reported in 15 Court of Claims. Suit was brought by Mary Thomas as an individual. It appeared that the property belonged to her husband, who was dead at that time. She had not been the administratrix of the estate, but the court held that she had such an interest in the property as would entitle her to present the case so as to bring in later the parties in interest.

Recent decisions are to the effect that such amendment will be allowed. I do not want this question to go to the Supreme Court for an illiberal construction, but to confirm the Court of Claims in its latest decisions by this amendment.

Mr. STEPHENS. I am acquainted with a case in which the Comanche tribe of Indians murdered the father and mother of the Babb family. Afterwards the case was brought up for recovery, and H. C. Babb, who seemed to be the eldest son, filed a claim for the burning of property and the taking away of stock, and instead of joining his brothers and sisters, he failed to do that, and the courts afterwards held that he could only recover a small proportion of the amount of the loss.

Mr. ROBESON. That is a case where the eldest son of the family tried to recover by suit and recovered only his interest as an heir.

Mr. HINSHAW. Is it not usual in these suits for the damages to come out of the Indian fund?

Mr. ROBESON. No, sir. As a matter of bookkeeping, the judgments are charged up to the Indians, but it is not taken out of their funds. Payment is made out of the Treasury.

Mr. HINSHAW. In all cases where the Indians are held to be in amity with the United States it is held that they are not to pay the judgments?

Mr. ROBESON. Yes, sir; in all cases, except where judgment is rendered against the Utes and Osages. They have an abundance of funds.

Mr. HINSHAW. The theory of the law is that it comes out of their funds, but as a matter of fact the Secretary of the Interior decides that the Indian funds are not more than sufficient to subsist them?

Mr. ROBESON. Yes, with the exception of the funds of those two tribes.

Section 4 relates to the question of the cases pending in the Court of Claims and as to the jurisdiction of the court of certain cases. The act of March 3, 1891, says that "no claim shall be considered pending unless evidence has been filed therein." The Supreme Court, in defining the word "pending," decided that the effect of this provision was that no cases should be considered pending unless evidence had been filed, and that the evidence filed must be such evidence as was required by the rules and regulations of the Secretary of the Interior. I have cited that case in my brief.

The rules of the Secretary of the Interior required that application must be made by the claimant or his agent; that the declaration must state the tribe of Indians committing the depredation. It must describe the property destroyed, giving the quantity of each class of property and the quality and just value of each article or piece of property and the time it was taken or destroyed.

It has been my privilege to represent perhaps 500 cattlemen. Their cattle were scattered on the ranches in Texas, Oklahoma, and New Mexico, and they did not know the number of cattle owned by themselves. They would start a ranch with 500 or 600 cattle. There was a certain percentage of loss and a certain percentage of increase, and in that way they could make calculation so as to determine about the average of the herd, and they calculated that a herd would double itself in about four years. They would not sell any cattle. This was during the war or at the close of the war, and there had been no market for cattle for eight or ten years. In that case they would naturally expect that in four years they would have 1,000 cattle and in four more years they would have nearly 2,000. The Indians came down in great numbers in the nighttime and drove off their cattle. They drove the herders away from the cattle and cut off as many cattle as they thought they could drive away, and drove them straight to New Mexico, where they sold them to New Mexican traders. The cattlemen did not know how many cattle they had on the ranch at that time. The herders would estimate that they had 2,000 cattle.

After the Indians left the herders would go out and collect, say, 300 cattle. They would estimate, as they had 2,000 head of cattle, that they had lost 1,700 head, and the owner would bring suit for that number. I have never known a man who recovered that difference. They did their best to show the actual number of cattle lost. They introduced witnesses who had worked with cattle all their lives and with their own cattle, who could estimate remarkably close to the number of cattle actually in a large herd, or the number that

ought to be in a large herd under different conditions. They estimated the number driven away by the width and depth of the trail and the number of cattle they succeeded in recovering. These people, or herders, are naturally liberal to the claimants, and naturally the court's estimate is liberal to the Government. As a result, while the witnesses would estimate that 1,700 herd were taken, the owners recover the value of something like one-third of that estimated number.

It was utterly impossible for a claimant in such a case to tell exactly how many cattle he has lost or the value of them; and yet the rules of the Secretary of the Interior provided that the claimant must do that in his own affidavit. They required that he must file the deposition of two or more persons having personal cognizance of the facts. They must tell when, where, and by what Indians the depredations were committed, and the property must be set forth in every affidavit. If that rule be enforced, as it must be in all cases of this kind, then my boss herder—who left the cattle ranch this morning, after rounding up and ascertaining the number, and then went to the store and returns to-morrow morning to find the cattle gone—would not be a competent witness under the rules of the Secretary of the Interior, because he has no personal cognizance of the facts. He can not tell the tribe of Indians who committed the depredation, because he was not there; and he would not be allowed to give any facts to which the court would listen, although he left there that very morning and returned the next morning to find only 300 cattle out of the 2,000. He found, let us say, that there was a distinct trail leading to the Indian reservation. He took the herders and followed the marauders to the borders of Fort Still. That evidence would not be allowed by the Secretary of the Interior. The Court of Claims has rendered hundreds of judgments on evidence of that character, as any court would have done.

If the loss occurred subsequent to 1865, in the court trying the case such evidence is competent; but before the Secretary of the Interior, who, it is reasonable to suppose did not know any law, that evidence would not be accepted. A man suing under the act of March 3, 1891, on such a claim, accruing prior to July 1, 1865, would have no standing in the Court of Claims, because his suit would not have been considered as pending before the Secretary, but if the loss occurred on July 15, 1865, he could secure a judgment on such evidence. More than this, the Court of Claims has decided, in an opinion, that it regards affidavits filed before the Secretary of the Interior as possessing very little weight.

We ask you to say that a claim is "pending" if it has ever been filed before the Secretary of the Interior. Not many cases would come in under this amendment. Perhaps there would not be 100 cases.

Mr. MORSE. Would not that open up a good deal of fraud, or would it not give claimants a chance to make cases if the Government said they could put in that evidence?

Mr. ROBESON. I think not, for the reason that there is just as much difficulty in securing witnesses for the claimants as witnesses for the defense. If a claimant loses property it is hard for him to find somebody to testify. There is just as much difficulty to claimants

securing evidence in these old cases as there is to the defendants in securing unfavorable testimony.

Mr. HACKNEY. Does the bill affect ex parte affidavits filed with the Department?

Mr. ROBESON. No, sir. The original bill provided that affidavits filed with the Secretary might be considered as evidence in certain cases.

Mr. HACKNEY. The law would remain as it has been heretofore in force?

Mr. ROBESON. Yes, sir.

Mr. HINSHAW. Would not this section allow the most indefinite kind of claims or affidavits as to its claims to be considered as pending? There is nothing saying it must specify in any particular.

Mr. ROBESON. I think that section is criticisable for that reason. I think it should be amended so as to provide that the property and the kind and value of property taken and the time should be designated, and the Indians "as near as may be."

Section 5 is in reference to the competency of the affidavits, and I am reminded in that connection of the case of Nesbitt & Moore against the United States, in which the Supreme Court says that the claims must comply with the rules of the Secretary of the Interior. It was impossible to do that. That provision is unfair.

Mr. STEPHENS. I think it ought to be as strong as a petition in case of a suit for ejectment or a writ of injunction. This ought to be as strong as one of those petitions.

Mr. ROBESON. I think that affidavits ought to declare, as to depredations, that the tribes of Indians should be named as near as may be, and also they should describe the character and quantity of the property, its value, etc.

I have never found an application filed before the Secretary of the Interior that did not contain those material statements; but I will indicate a modification, such as Mr. Hinshaw and Mr. Stephens have suggested.

Section 5 provides for the reinstatement of such cases as are affected by the several decisions on citizenship, amity, the failure to designate accurately the Indian tribes, and the failure to comply with the rules and regulations of the Secretary of the Interior.

The Assistant Attorney-General in charge of these cases no doubt will state to the committee that hundreds of cases have been voluntarily dismissed, with the understanding and belief that if this readjustment was permitted the cases would be reinstated.

Mr. HINSHAW. How much would it involve, in number of cases or amount of money?

Mr. ROBESON. I have a table here, and the Assistant Attorney-General has one also, not more accurate, but fuller, than my information. I think the number of cases reinstated will be about 2,000, and the judgments made possible by these amendments under $2,000,000.

Mr. Morse asked the other day whether it would be equitable to reinstate the case of a man who was not a citizen of the United States, but who had brought suit, and to deny an opportunity to other noncitizens now to sue. I want to make my answer a little

fuller now than I did then. I wish to say that when the act was passed, providing that the Court of Claims should have jurisdiction over all claims for property of citizens of the United States taken or destroyed by Indians, Congress might have meant that citizenship should exist at the time of the passage of the act. It might have meant that citizenship should exist at the time of the filing of the petition. It might have meant that it should exist before judgment was awarded, or that a claimant must have been an actual citizen at the time the property was taken. It might mean any one of those four times to which citizenship should relate. It took two decisions of the Supreme Court to settle that. I am reenforced in the position I took the other day when I stated that a claimant could not be expected to know the time to which the question of citizenship related.

For illustration, Mr. Morse and I live side by side. Each of us lost property at the hands of Indians.

Neither of us was a citizen of the United States when the property was taken, but both had become citizens when the act was passed. Our ideas are different as to the time to which citizenship relates. He thinks it relates to the date of the depredation. I think, and with much reason, from the words of the act, that it relates to the time of the enactment of the law. I bring a suit and Mr. Morse does not. I say that I have exercised greater diligence, though he showed better judgment in determining the time to which citizenship related. Steadfast in my belief that one a citizen at the time of the passage of the act would have the right to recover, I proceed with the taking of testimony and establish my case. I say that the fact that Mr. Morse can not come into court fifteen years after the jurisdictional act was passed does not alter the proposition that, as an inhabitant of the United States, I, who brought a suit, had been promised in many acts eventual indemnification for my losses, and that he can not complain because when Congress comes ultimately to redeem that promise it does not embrace him. I should say here that I have never known an instance where an inhabitant was deterred from bringing a suit by reason of the requirement of citizenship.

Mr. Morse's question also involves the determination of a proper policy to be pursued by Congress. Is it wise to reopen the dockets of the courts by providing further time in which new suits may be instituted? We have no hope or expectation that Congress will ever reopen the courts to the filing of such claims. Considered purely as a matter of policy, I do not think that they ought to be reopened for that purpose, for the reason that Congress was reasonably liberal in providing three years for the institution of such suits, and if we are to judge from hardships which may be occasioned by the passage of this amendatory law, let us consider those which are occasioned by the law as it now stands. A man who is a citizen and one who is not, live side by side. They contribute their services to the taming of the Indian, the development of the natural resources of the country, and to its settlement. They lose property on the same day and in the same depredation. At the time of the loss of the property each relies, and has a right to rely, upon the promise made to him in the various acts of Congress—a promise made to both the citizen and the inhabitant. We fulfill the promise as to the citizen and deny it as to

the inhabitant by the act of March 3, 1891. Is it fair? Is it honest to the inhabitant? Where is the justice in it? The law of 1891 does not fulfill, but violates its promise. When you consider that the Secretary of the Interior by an act as late as that of 1872, was directed to examine claims of inhabitants as well as those of citizens and to approve and allow them and to report them to Congress, and that such claims were paid to inhabitants, who were not citizens, do you think it was the intention of Congress to exclude inhabitants when it passed the act of 1891? If it had been the intention of Congress, was it a proper one? If it was not a proper one, why shall we not remedy the evil? This question of the standing of an inhabitant under the law seems so clear to me that I am without further argument in support of it.

Mr. STEPHENS. Is that the construction of the Supreme Court or of the lower court?

M. ROBESON. Of the Supreme Court. Two cases were heard there—those of Valk and Johnson, cited in the brief. The Supreme Court held, affirming the judgment of the Court of Claims, that citizenship as provided in the act related to the date of the depredation.

Finally, it is not an exaggeration to say that nine claimants out of ten believed themselves to be citizens, and so alleged—

1. Because of service in the Army.
2. Because they had declared their intention to become citizens.
3. Because of a supposed collective naturalization, accomplished by the annexation of the Republic of Texas, or the organic acts admitting Nebraska, for instance, and others of the newer States.
4. Because of the naturalization of their fathers, which in many instances can not be shown from the incompleted or mutilated records of courts.

When the Secretary of the Interior was examining claims and reporting them to Congress, he examined and allowed some claims of inhabitants as well as claims of citizens. Those claims were paid. There are two men at this moment residing in the State of Washington who lost property at the hands of the Indians. The property was lost on the same day in the same engagement, and they were both fighting the Indians. One was a citizen and the other was not. Both of them fought the Indians and were rendering service to the country. The Secretary allowed both claims. The attorney for one was diligent; his case went to judgment and was paid. The attorney for the other claimant was not so diligent, and while the case was pending, the court rendered its decision on citizenship, and the second one went out of court.

Mr. MORSE. Do you think that an unwarranted payment of one judgment ought to result in the payment of others?

Mr. ROBESON. I do not think that at all. You are opposing the removal of the requirement of citizenship because it will work a hardship to those alien inhabitants who did not bring suit, and for whom the courts will not be reopened. I say that it is a hardship to the men who did not file. It is a hardship to him not to open that act. But if you are looking for cases of hardship I could " harrow up your soul " with them, selecting cases from among those brought in the court, due to the unequal effect of the action of the Attorney-General or the court.

I desire to mention the case of Mr. Marsh, a banker in Omaha, a citizen of the United States, who suffered from an attack made by Indians on his wagon train. Penny and son were in the same train belonging to Mr. Marsh. They also suffered. They both brought suit. Penny and son stated in their claim that at the time the Indians took the property, the Indians were hostile. Why should they not have said that the Indians were hostile? The Indians came upon them in war paint; they were armed with guns and bows and arrows; the natural impression was that they were hostile in an ordinary sense, because they forcibly took the property. The Court of Claims accepted that statement and dismissed the petition. In Mr. Marsh's case it was adjudged that the Indians were not hostile, having become peaceable only a few days before. By a special act Penny and son's case was reinstated and afterwards they got judgment; but the passage of that special act was a miracle.

There was a case in which the Court of Claims changed the date that marked the beginning and ending of hostility of a certain tribe, in a subsequent decision, thereby affecting a number of claims.

Mr. HACKNEY. That might have been done on particular facts in this case.

Mr. ROBESON. No. The courts do not determine the question of the time of hostility from the testimony of individuals. They go to the War Department reports and the reports of the Indian agents throughout the country and accept those as evidence of hostility or amity, according to the facts given officially.

The courts do not accept the opinions of laymen, except where it appears, for instance, that houses have been destroyed in a wholesale manner, or that many men, women, and children have been killed or injured, mail coaches attacked, or troops ordered out.

Mr. HACKNEY. The Penny case turned on the question of hostility, and that was lost.

Mr. ROBESON. That is true.

The CHAIRMAN. Is there not some data in the War Department by which that is regulated?

Mr. ROBESON. Yes; the official reports of the War and Interior Departments, and authentic histories. The Court of Claims held that the Kiowas and Comanches were not in amity from the 1st of June, 1874, to the 1st of June, 1875. On the 15th of May, 1874, fifteen days before they became hostile, about fifty or sixty Comanches left the reservation (the tribe being in amity), went into southern Texas, and committed a great many depredations.

On the night of the 31st of May, 1874, aout 11 o'clock, this prowling band stole the horses of one of the citizens, who brought suit on account of his loss and recovered judgment therefor. Two hours afterwards—that is, early on the morning of June 1—they stole the horses of a neighboring ranchman, who lived some eight or ten miles away. Under the decision of the court that the Indians became hostile on the 1st day of June, 1874, the depredators were in amity at 11 o'clock on the night of the 31st of May and the ranchman whose horses they took at that time can recover, while his neighbor, who lost his property two hours later, can not recover because his loss occurred on the morning of the 1st of June.

Mr. HINSHAW. The same thing occurred on the Republican River in Nebraska.

Mr. ROBESON. That was in 1865. Tey entered into treaties in 1865—the Sioux and Cheyennes at the conclusion of the difficulties of 1864–65. The first one went into effect October 10 and others from that date to October 28, 1865. Mr. Marsh's property was taken on the 1st of November, 1865. Penny & Sons' property was taken at the same time.

The CHARMAN. We are at peace up to the very time of the declaration of war. There must be some action taken about it, fixing some time as the beginning and the end of such periods.

Mr. ROBESON. I would like to hold you to the first proposition, that we are at peace up to the time of a declaration of war. We never declared war against Indians in our lives.

The CHAIRMAN. Is not this rule of the Department one of policy?

Mr. ROBESON. Yes; but it is an unreasonable one.

The CHAIRMAN. But the statement of the Secretary that it began at a certain time settles the question; so that a man may be unfortunate if his depredation took place on one day and the status of amity was not restored until the next day. It is simply his misfortune and it is nobody's fault that he was shut out, is it?

Mr. ROBESON. No, and I am not saying so; but it is a misfortune that ought not to be permitted. I am saying how unjust it is that want of amity should be a bar to prosecuting a claim; and I am trying to show you upon what unsubstantial evidences the court must depend in determining the question whether the Indians were in relations of actual peace. Sometimes the beginning of a hostile period is indicated in the report of an officer that he, with a body of twenty-five or thirty troopers, encountered the Indians on the plains and had a fight with them. Sometimes a publication in a newspaper in a community wrought up by an occasional homicide or by continued depredations will serve as a basis for such a finding. Sometimes an army officer, desirous of exploiting his own gallantry, may have made an exaggerated report or attached too much importance to some incident of a collision with Indians.

Let me give you some instances: In the case of Montoya, to which I have adverted, it was held that there was a war with Victorio's band, composed of members of different tribes. Sometimes the band numbered as many as a hundred Indians. If Victorio and his band had the capacity to be hostile, there is no doubt of their hostility. With reference to that band, the court declared specifically that each one of the tribes from which the members of that band were recruited was in a state of amity, but it dismissed the suits because of the hostility of this little band of renegades.

The CHAIRMAN. That is, the Supreme Court held that?

Mr. ROBESON. Yes, the Supreme Court affirmed the judgment of the Court of Claims.

The Court of Claims held that a state of war existed in Utah with Black Hawk's band in 1865. Is the Representative from Utah present.

Mr. HOWELL. Yes, I am here.

Mr. ROBESON. That band was recruited likewise from the different tribes of Utes; and it was held that that band was hostile. As a matter of fact, there were a few engagements between the citizens of that country and the Black Hawk Indians, but we did not send any troops there. We had no relations with these Indians at all. These

renegades gradually centered themselves around Black Hawk, making a band of 50 or 75, and some people were killed.

Mr. HOWELL. There were about 40 killed. He continued his depredations for three years—1865, 1866, and 1867.

Mr. ROBESON. Yes; and the court decided that for losses during that entire period there could be no recovery, because that little band of Indians under Black Hawk coming from tribes of Indians in amity with the United States at the time, was hostile, and the citizens of Utah can not recover.

The court has held in the case of Conners *v.* United States that a band of 49 adult male Cheyennes was a band within the meaning of the act. The Cheyenne tribe at that time numbered about 2,000. The court has held specifically that the Cheyenne tribe, to which they belonged, was in amity with the United States, that the other bands of the tribe which went down with that band of Dullknife to the Indian Territory and did not escape with him, were in amity with the United States, and that that little band of 49 men who made that run across Kansas and Nebraska was a band which was hostile, and the citizens can not recover for their depredations. The Secretary of the Interior had allowed $12,000 or $15,000 to various claimants on account of the losses suffered by them in the course of that flight. Some of those cases were submitted to the court. The Government at that time thought that a defense of amity should not be interposed, and the court awarded judgments. Some of those claims have been paid. Twelve or fifteen have not been paid, but have been repelled from the court on account of this decision.

It has been held in the case of the Mescalero Indians, who left their reservation without hostile demonstration, fled to the mountains, and lived by the chase, killed fewer men than they had slain when they were on the reservation, and took only such property as they needed for their subsistence, no troops having been sent after them; that for the six years they were absent from their reservation they were not in amity with the United States; and the man from whom they took 20 or 100 sheep, or the man who lost a horse (all the losses are small), can not recover. Now, the court made that finding, notwithstanding they had previously found that the Indians had a right to leave their reservation peaceably. But if, in escaping from their reservation, they are beset by troops and they fight the troops, they are then in hostility with the United States. Now, follow these Mescalero Indians.

Soon after their location upon this reservation the authorities of the Government placed upon the same reservation their ancient and hereditary foes, the Navajoes. The Mescaleros had been actually pursuing the arts of peace, and much progress was being made by them at the time the Navajoes were introduced on their reservation. Then the irrigation ditches the Mescaleros had constructed were destroyed by the Navajoes. The melons and fruits they had raised were plucked by their enemies. An unwary Mescalero, caught away from his companions by the more numerous Navajoes, was the victim of exceedingly rough treatment. Numerous petty interferences with them by the Navajoes became unendurable, so that, without molesting the agent or his family and without lifting a hand against a white man, the Mescaleros quietly left their reservation on the night of November 3, 1865, and sought the refuge of the mountains. That act

of departure from the reservation has been taken by the court to mark the beginning of a long period of hostility, notwithstanding a previous decision that the peaceable departure of Indians from a reservation, though without the consent of the authorities, was not a hostile act. That gives you an idea of the difficulties in demonstrating to the court that the Indians were in amity.

When Loco's band of Chiricahuas fled from the reservation toward Mexico, they were overtaken by the troops who drove them over into Mexico. The court held that they were in hostility for the eight days of their flight, and the people who lost property taken by them for their subsistence as they fled, can not recover for it because of that hostility. This is denominated by the court as "a war of eight days."

Finally, the court has decided that a war with the Utes began at sunrise of one day and ended with sunset of the next—a war of two days with an Indian tribe!

The CHAIRMAN. The time of adjournment has arrived, but before the committee rises I want to say just this much. The suggestion was made the other day that there was some chicanery—and it seems that the suggestion was well founded—in the enrollment of the bill, of the act of 1891, in the insertion of the word "bands" in the law. I have gotten those original papers, and I have them here and would be glad for any member of the committee to look at them. It would appear from the original papers that the Senate engrossed bill was engrossed on February 19 of that year, 1891, and had in it the word "bands;" that a week or ten days later that bill was made the basis of the conference report, and the typewritten conference report omits the word "bands."

Apparently that was the mistake of the typewritter in making that copy, and apparently after that conference was agreed to the enrolling or engrossing room used the original engrossed bill which was supposed to have been used and which undoubtedly was used by the typewriter in making that copy, and included the word "bands." So that seemingly, instead of it being chicanery in inserting that word "bands," it was the oversight of the typewriter in leaving it out in drawing up the conference report.

Mr. STEPHENS. This bill is designed to correct that, is it not?

The CHAIRMAN. Yes.

(At 12 o'clock m. the committee took a recess until 2 o'clock p. m.)

AFTER RECESS.

The committee reassembled at 2 o'clock p. m.

Messrs. W. H. Robeson and Harry Peyton, and Hon. J. G. Thompson, of the Department of Justice, were present.

STATEMENT OF W. H. ROBESON—(Continued).

The CHAIRMAN. Mr. Robeson, you may proceed.

Mr. ROBESON. I have omitted to call the attention of the committee to one case which illustrates the variation in the opinions of the Court of Claims on the subject of amity and particularly its consideration of the word "band" in the act of March 3, 1891.

In November, 1890, the Sioux Indians, on several reservations in North and South Dakota, were the victims of a religious frenzy which we know now as "ghost dancing." The Standing Rock Agency was distant from the Pine Ridge Agency about 300 miles. At Standing Rock Agency Sitting Bull and his band of Uncopapas were located, Sitting Bull living a short distance from the agency building. It was determined to arrest Sitting Bull because he was supposed to be the chief spirit which brought about the disorder and the turbulence that were marking the actions of the Indians at that time, and on the 15th day of December of that year the Indian police were sent to arrest Sitting Bull. In their endeavor to arrest him they killed him and two or three other Indians.

That incident occurred, as I have said, 300 miles distant from the Pine Ridge Reservation, where the Ogalalas were located, and it occurred on this reservation, which was the reservation of the Uncopapes. The Ogalalas and the Uncopapas actually spoke a different language. They were maintained at different agencies and were parties to different treaties. On the 15th day of December, 1890, on the Pine Ridge Reservation there was absolute quiet. There had been no disturbance of any kind except that which naturally arose out of the efforts of the agent to prevent the Indians from engaging in this ghost dancing. Yet the Court of Claims has held that because of the killing of Sitting Bull, who did not belong to the Ogalala tribe, at a point 300 miles away, while he was resisting arrest, the Ogalalas became hostile, and they fixed that as the date of the beginning of the period of hostilities, on the part of the Ogalalas.

Mr. STEPHENS. Was Sitting Bull a member of the Ogalala tribe?

Mr. ROBESON. No; he had no connection with them; he was as different from the Ogalalas—except that they were all Sioux—as a Kiowa is from a Comanche. They even spoke a different language. But the court has held that the Ogalalas became hostile on that day when Sitting Bull was killed. When they held that they utterly disregarded their holding in the Conner's and Montoya cases, to which I have referred, relating to the hostility of a "band." While Sitting Bull's band may have become hostile by reason of the killing of Sitting Bull, this tribe of Ogalalas, 300 miles away, who knew nothing about and cared nothing about Sitting Bull, were in amity with the United States.

Now, the court holds that the hostility occasioned by the arrest and killing of Sitting Bull marks all the Sioux Indians of South Dakota as having become hostile on that day; and yet I do assure this committee that it was not until the 29th day of December of that year, fourteen days after Sitting Bull was killed, that any overt act of unfriendliness occurred between the Oglala Indians on the Pine Ridge Reservation and any citizens or troops of the United States. That period of a want of amity, according to the court, lasted thirty days, terminating on the 15th day of January, 1891.

When you leave the railroad at Chadron, Nebr., to go up to Deadwood you pass through Hot Springs, S. Dak., where there is a magnificent hotel building and a summer resort, and through the towns of Rapid City, White Wood, and Sturgis. The Rapid River runs through a beautiful, fertile valley. At that time there were numerous settlers who had large herds of fine cattle in that valley, not numbered by the thousands, as we have them in Texas, but one man would be

the owner of 300 or 400 head of cattle of fine quality, cattle which were being fattened for the Chicago market.

These Pine Ridge Indians, the Oglalas, from November 31 until about Christmas time, having gone in a considerable body off the reservation and on to the land where these white men pastured their cattle, took a great many of those cattle. The court has denied them judgment on the ground that the Indians were hostile on the 15th day of December, yet very shortly after the expiration of the alleged hostile period Congress voted $100,000 to be paid to the Indians and the squaw men on the Pine Ridge Reservation for their horses and cattle which were taken from them by the alleged hostile Indians; and yet those white men, who had located their cattle rightfully beyond the borders of the reservation, are denied judgment in the Court of Claims against Indians who had wrongfully left their reservation and had gone into the territory which white men only had the right to occupy. Now, I submit to the committee that that presents a very unusual case, and that the decisions of the Court of Claims have resulted in great injustice to those citizens.

Mr. STEPHENS. What was the style of that case and where would it be found?

Mr. ROBESON. The style of the case in the Court of Claims?

Mr. STEPHENS. Yes.

Mr. ROBESON. The original opinion was in the case of McCormick *v.* United States.

The chairman [Mr. Sherman] has explained to the committee that while I was entirely justified in saying that the word "band" did not appear in the bill as reported by the conference committee, that the mistake was with the report of the conference committee, and that there had been no insertion of the word "band" in the bill. It had appeared in the engrossed bill as it was originally considered by the conference committee. Very briefly I have urged upon the committee as strongly as I know how that the word "band" ought not to be in the act. To put my idea in concise language, the word "band" never appeared in any Indian depredations act providing indemnification until this act of March 3, 1891, was passed.

Now, I submit to my friend from Wisconsin that if he had been a Member of Congress and had considered this bill at the time it was up for passage, and the word "band" appeared in conjunction with the words "tribe or nation," there was but one sensible interpretation to put upon his action in voting for the passage of such a bill, and that was that it was his intention to legislate so that any body of Indians, no matter whether we call them a "tribe" or "nation" or "band," should be responsible and answerable for depredations, provided the band, tribe, or nation was in amity with the United States; and I also call to his attention—because he has given intelligent consideration and close attention to this bill—the fact that the decisions of the court, instead of carrying into effect that intention, have defeated it, in the declaration that it is their duty to consider the status of a band *of* a tribe, and that when the court so decided they simply nullified the intention of Congress; and further, if any Member of Congress who voted for the passage of that bill intended that, if a depredation was committed by a body of men comprising a band, the band being itself hostile yet belonging to a tribe in amity with the United States, the hostility of the band should prevail, what limita-

tions would the committee put upon the band? What should it number? If it numbered 500 and the tribe numbered 2,000, let us say, it was a band of a tribe. If it numbered 50, would you call it a band? The Court of Claims has. If it numbered 20, would you call it a band? The Court of Claims has. Then where is your limit? If it numbered 5, would you not also call it a band? At that the Court of Claims balked. They held that Victorio's band, which numbered from 30 to 100 men, was a band within the meaning of the act; but when Victorio was killed, in August, 1880, he left behind him his chief lieutenant, Nana, with a remnant of Victorio's band numbering from 7 to 30 persons who continued the bloody work that Victorio had done, and the Court of Claims has refused to hold that that was a band within the meaning of the act. I think they were right, but the courts were wrong in the other instance. If they were right in the other instance, I can furnish no reason why they should not have continued to call any handful of men from any tribe a band within the meaning of the act.

Mr. MORSE. Did the court legally define the word "band?"

Mr. ROBESON. Yes, sir; in the case of Connors *v.* The United States, referred to in the brief, Judge Weldon said that they would consider a body to be a band which cohered for any considerable length of time, and which recognized one of their number as being their chief or leader, and which had, for that purpose, severed the relations between itself and the main tribe.

Now, this band of Victorio, after Victorio would return from Mexico, as he did on several occasions when the troops had driven him there, simply became absorbed again into the tribe. The Mescaleros of his band went to their agency and drew their rations, and so also with the Chiricahuas, but when Victorio was ready to go again he was always able to find some turbulent spirits ready to go with him and continue the depredations.

Now, if this committee will strike out the words "in amity" it need not bother about the word "band." If the provision requiring amity be eliminated, then it does not do any harm for the word "band" to stay in. If the committee should retain the provision that the Indians must be in amity with the United States, I submit to you gentlemen, very earnestly and very respectfully, that the word "band" ought to be stricken out, because the interpretation put upon it and the construction of it by the Court of Claims simply annuls what evidently must have been the purpose of Congress, namely, that there should be a recovery against any aggregation of Indians.

Mr. MORSE. Is it not a fact that this whole legislation is based upon the theory of a gratuity and gift without any consideration—a gift from the Government to this people without consideration?

Mr. ROBESON. On that we have two diametrically opposite opinions. Chief Justice Nott, perhaps the ablest jurist who ever passed on these Indian questions, declared that any sum received on account of an Indian depredation was a gratuity; that it was not subject to any debts, and that the moneys must be paid directly to the claimant or to his heirs or legal representatives. About a year after that Judge Howry delivered an opinion in the McKenzie case in which he held that it was not a gratuity, but that while it is true that there was no obligation such as could be enforced in a court of law the Court of Claims, by the act of March 3, 1891, was to recognize it as a moral ob-

ligation upon the part of the United States, and that any moneys received by a claimant or awarded to a claimant was like any other property he had, subject to levy of execution for the satisfaction of any debts due from the claimant to anybody.

Mr. HOWELL. Under the first construction, then, the passage of this law would be merely to enlarge and extend these gratuities or gifts by the Government?

Mr. ROBESON. Yes; if that first decision is right. I will say to you very frankly, for what it is worth, that I think the first decision is right. I think this is unquestionably a gratuity, because it is nothing more nor less than the recognition of a moral obligation. There was never a legal obligation upon the United States to pay for losses occasioned by Indians.

Mr. STEPHENS. Which decision would be the law now; which do they adhere to?

Mr. ROBESON. The last one, that it is not a gratuity, and on the strength of that I have appeared for creditors of certain claimants who have recovered judgments against the United States, and secured the payment of obligations.

Mr. PEYTON. I would like to make this suggestion to you on that point, that while the payment of the judgment might be a gratuity, yet the citizen was under obligation to the Government not to seek private satisfaction or revenge for Indian depredations upon his property; that he was entitled under the law to that promise of eventual indemnification. In other words, if he would not pursue the Indians and seek private satisfaction or revenge, the Government would see that his claim was paid. Am I right?

Mr. ROBESON. Yes sir.

The CHAIRMAN. But you are asking here that we extend this gratuity beyond the citizen?

Mr. PEYTON. If I said citizen, I meant to say citizen or inhabitant, because they have always been equal under the law.

Mr. ROBESON. There will be no doubt in the minds of the committee that the promise, every time it was made, was made to the inhabitant as well as to the citizen until this act was passed.

The CHAIRMAN. When was the promise, as you call it, first made, and what was the promise?

Mr. ROBESON. May 17, 1796, thus: "You go to that country and settle, and till the soil, or do anything you have to do, and if any Indian belonging to any tribe in the United States takes your property make your claim to the proper authority; do not attempt to seek private satisfaction or revenge, give no just cause or provocation to the Indians to take your property, and in the meantime the United States will guarantee you eventual indemnification for all you lose at the hands of Indians."

Mr. HOWELL. Where will you find that?

Mr. ROBESON. In the act of May 17, 1796. It was brought into the general law of June 30, 1834—the trade and intercourse act. By the act of May 20, 1859, the United States receded from that promise of payment out of the funds of the Treasury. By the same act it declared that the liability of the Indians was not thereby destroyed.

Mr. MORSE. In 1879?

Mr. ROBESON. 1859. That is section 2156 of the Revised Statutes. By the act of 1872 it authorized the Secretary of the Interior to receive such claims and to investigate and examine them, and if approved, to allow them, and make report of his action to Congress. By the act of March 3, 1885, there was an enlargement of the power of the Secretary, authorizing him to maintain an independent investigation, and under the authority of that act special agents were appointed and sent out all over the country, and they took testimony and made their reports to the Indian Office, and the Secretary made his allowances, some of which were paid and charged to the tribal funds of the Indians. These allowances were made irrespective of conditions of amity, the only prerequisite being that the Indians were in treaty relations.

Mr. HOWELL. Have those reports ever been published, the reports made to the Secretary of the Interior?

Mr. ROBESON. No, sir; not printed—you mean printed?

Mr. HOWELL. I mean printed.

Mr. ROBESON. I understood you to ask if the reports of the special agent had ever been published. The allowances have been published. It is in Executive Document No. 125 of the Fifty-fourth Congress.

Mr. STEPHENS. The object in referring them to Congress, as I understand, was for payment?

Mr. ROBESON. Yes, sir.

Mr. STEPHENS. It would be of the same nature as a judgment of the Court of Claims would be now?

Mr. ROBESON. It did not have the same force and validity as a judgment. As a matter of fact, Congress paid a number of those allowed claims.

Mr. STEPHENS. Would it not be somewhat on all fours with the judgment of the Court of Claims where they investigate and report to Congress the amount due any individual?

Mr. ROBESON. I would be willing to say that it would have the same standing as a finding of fact made by the Court of Claims, but of course if I come here with a judgment of the Court of Claims I do not have to go before a committee and ask that it be paid. Judgments are paid as a matter of course.

Mr. STEPHENS. Then did not the Secretary of the Interior, by special agents, investigate each one of these claims and report the amount found due?

Mr. ROBESON. He did.

Mr. STEPHENS. What would be the difference between the finding of the Secretary of the Interior and the finding of the court?

Mr. ROBESON. The court has the power to render judgment; the Secretary of the Interior only had power to make report of his findings to Congress. In the act of 1891 Congress directed that when any of those allowed cases was reported by the Court of Claims, unless either the Government or the claimant elected to reopen the case, the court should have the perfunctory duty of awarding the amount allowed by the Secretary of the Interior. In other words, if there is no objection to this allowance on the part of either one of the parties, the Court of Claims need not inquire further; claimants need not introduce any other evidence. All that is necessary is for the court to render the judgment, and that was the regard in which the court held the allowance of the Secretary of the Interior.

Now, I will say to Mr. Morse (and I mention him particularly because he has seemed to be opposed to this citizenship and the band amendments) that in looking for some justification for the insertion of the words "in amity with the United States," when I approach a Member of Congress and ask him to justify the insertion of these words—and I have approached several who have been unfriendly to this proposed legislation—the invariable answer has been that the United States has never at any time agreed to pay for damages occasioned by the enemy in time of war. Let us say, gentlemen, that that is a very well-established policy of our Government, and I presume of all civilized governments. Now, when you come to apply that principle as between our Government and some other independent sovereignty we find that it is a universal policy. We find that all governments have that same policy. I want you to tell me by what process you are able to make that theory or policy applicable to our relations with Indian tribes. I want to impress upon you, and upon any members of this committee who are unfavorable at the time to this legislation—I want to impress upon you that there is as much reason in saying that hostility could exist between the Indians and the United States as to say that it could exist between father and son, or guardian and ward.

You must remember that the Indians in the United States are your dependents; that they are not sovereigns. You make a treaty with England or Spain. Suppose you break it. There is war in many instances, unless there is some provision for breaking it or some limitation of time. You make a treaty with the Indians and you promise them that they shall live forever on a reservation, and that the foot of a white man shall not be set there; and the next Congress will throw that open to public settlement in violation of that treaty. How can you do that? The Supreme Court says you can do it; and you did it when you took the lands of the Comanches and Kiowas and threw them open to public settlement. Upon what theory can you do that? You violate your agreement with the Indians; you directly annul the treaty that you had made with them—a treaty which was as solemn a document to them as a treaty between our country and England is to us. You do it because you have the power to do it; you did it because they were your domestic dependents; you did it because they were your wards; you did it because you were more intelligent and more enlightened than the Indians, and the Supreme Court of the United States says you had the right to do it.

Mr. MORSE. Then you would put them on the ground of the immigrant who comes here, who is not yet a citizen and who destroys the property of an American citizen. Would you put them on a par with that man?

Mr. ROBESON. Not by any means. He is an alien; the Indian is not, and has been particularly declared by the Supreme Court of the United States, in twenty instances, not to be an alien.

Now, I say that that principle which is applicable between independent governments is not applicable between the United States and the Indians; and I will say that you never have applied any other international principles to your affairs with the Indians except in this single case of Indian depredation, where the people to whom you made a promise have come and claimed its fulfillment.

Mr. STEPHENS. And you would call the Indian a domestic national ward?

Mr. ROBESON. Yes, sir; he is not an alien; he is a domestic, a dependent, and he is a ward, and all of them were such until you made citizens of the United States out of those who withdrew from the tribal relations. The first declaration we had on this subject was that of Chief Justice Marshall, and I think we are all familiar with that. That appears in 5 Peters, and was reaffirmed in 6 Peters, and down to 150 United States Reports, in the case of Jones *v.* Meehan, where the same declaration was made by the Supreme Court.

Now, the committee has more than once suggested that it would like to know something about the figures, and I want to give them. Before I give you my estimate of what liability would be assumed by the United States, if this act should pass, I would give you a short statement to show how the judgments of the Court of Claims have decreased in dollars and have decreased in percentages since the court first began to render judgments in 1891 and 1892; and I will give to the stenographer a table, which may be inserted in the record, showing the average amount claimed and the average amount of judgments and the average per cent in the various years since the act was passed. I am not going to read all of this table to you, but only a portion of it.

In 1892 the average amount claimed was $3,700, I mean in the cases which went to judgment; the average amount allowed was $1,900, making a percentage of 53. From that time for two years the average of all amounts claimed and the average of the amounts of judgment are slightly greater, the percentage, however, going down from 53 to 43. The highest percentage reached was in the years 1895–96, when the best of the cases was disposed of. From that time the percentage of judgments has ranged from 37 to 29.8. While, therefore, the average judgments in 1893 and 1894 was about $2,400, the average judgment in 1905 was but $1,270. In 1906 it was $1,045, and in the year just passed, 1907, $1,100.

Mr. THOMPSON. Are you comparing those to the amount claimed in the particular case?

Mr. ROBESON. Yes, sir.

Mr. THOMPSON. The evidence last year was different.

Mr. ROBESON. I know; the average amount of these judgments last year and the judgments unpaid now you refer to.

Mr. THOMPSON. Yes.

Mr. ROBESON. The judgments unpaid, the average claimed in the fifty cases, was $3,680, and the average judgment was $1,000 and the percentage 30.

That enables me to say to you gentlemen that it possesses this significance. The act was passed in 1892, fifteen years ago. In those fifteen years, if I should guess, I should say that 1,500 witnesses have died. There is nothing the matter with the cases which have been considered in the later years—I mean nothing which goes to their honesty, and nothing which goes to the integrity of the claims—but it was the inability of the claimant to procure his witnesses that has caused this remarkable decrease in the amount of the judgments and in the percentages compared to the amounts claimed. And I also want to say to the committee that among 10,841 cases filed there is not one in which the Court of Claims has ever sustained a plea of

fraud. There have been perhaps ten or fifteen cases in which the Government has filed the statutory plea of fraud, which if established would have resulted in the dismissal of the entire claim, no matter whether the fraud attached to every item of the claim or not; and I believe that it would be impossible to establish a jurisdiction in which so many claims might be filed and have less of real, actual fraud in them than there is in these Indian depredation cases.

Before we come to the figures I want to say just one word with reference to the Court of Claims. I have explained to the committee that the Court of Claims has occasionally reversed itself in its decisions upon amity; that it has given opinions that are not uniform on some subjects, and that is not intended so much as a criticism of the court as it is a criticism of the law. The court has had to proceed in the determination of these cases of amity without guide or precedent. It has had to decide what evidence would justify it in passing upon the questions of amity or hostility, but there is no question that when the Court of Claims comes to consider an Indian depredation case, or any other sort of a case against the United States, it is invariably a matter for consideration that the United States is the defendant; and when it comes to the determination of cases of any kind, and there is a doubt to be resolved, that doubt is resolved in favor of the United States; and the committee may be assured that when a man comes out of the Court of Claims with an Indian depredations judgment he has run the gantlet of the Attorney-General's office, which has been skillful and diligent and able and persistent in the presentation of any sort of defenses that really existed, or that they thought might exist, and that of those of us who have succeeded in securing judgments from the Court of Claims in these cases, it may be said of them, "These are they that have come up through great tribulations."

Before leaving this subject finally with you I want to call the attention of the committee to something which it would be very proper seems to me may be very properly stated here. The Supreme Court to state to a court, and which, as there are lawyers on the committee, it of the United States has said that in the case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect; and there is a long line of decisions in which that principle is declared. Again, it is said that the construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons. Again, the Supreme Court says: "It is our duty not to overrule the construction of a statute upon which the Land Department has uniformly proceeded in its administration of the public lands except for cogent reasons." In the case of Peter *v.* Howe, the Supreme Court upheld the well-established rule of the Interior Department, saying, that as it was considered that "the rule thus applied in the practical administration of the statute by the official by law charged with its execution conforms with its intention, we are unwilling to overthrow it by reason of a mal and technical construction." When the Secretary of the Interior, by the acts of May, 1872, and March 3, 1885, was authorized and directed to examine these claims and pass upon them and report his action to Congress, invariably the Secretary of the Interior found that these Indians were parties to a treaty which obligated them to keep peace with the

United States and to pay for depredations, and the construction of the Department was that, the Indians being in treaty relations with the United States, they were in amity with the United States.

Now, that condition of affairs continued from 1872 until the time when the Court of Claims acquired jurisdiction, and held, despite the departmental construction, that the existence of treaty relations between the Indians and the United States was not conclusive evidence of amity. There is but one case to my knowledge—and I believe I have seen every one of them—in which the Secretary of the Interior ever passed upon a question of amity independent of treaty relations. I believe the Secretary did not do that, but the superintendent of Indian affairs for New Mexico, Mr. Merriwether, at that time the Territorial governor, found in a certain case that the Indians were not in amity with the United States. Long years after that man was dead I presented that case to the Court of Claims for his heirs, and the Court of Calims held that the Indians were in amity with the United States. So that in the solitary case in which the Department, through its agents, ever considered the question of amity and found it against the claimant the Court of Claims took a different view, finding that the Indians were in amity and awarded a judgment.

Mr. PEYTON. That is, that the Indians were in amity?

Mr. ROBESON. The court found that the Indians were in amity and awarded a judgment. So the Court of Claims, in making this finding that treaty relations were not sufficient, disregarded, despite all those decisions on the subject, the long-continued departmental construction (exactly contrary to that adopted), which was the only construction given the word "amity" when the act of March 3, 1891, was passed.

Mr. HACKNEY. May I ask the question—and probably you have answered it many times, but I would like you to repeat it—what depredations have been committed that would be covered by this act that you would regard as of such character as to be justly chargeable at a time when the Indians were not in amity; in other words, would any of these claims come under any of the well-recognized wars of the past?

Mr. ROBESON. Yes, sir.

Mr. HACKNEY. What wars?

Mr. ROBESON. There unquestionably was a war——

Mr. HACKNEY. I mean now what claims would we have to deal with that would be opened up which arose out of a well-recognized Indian war?

Mr. ROBESON. There was unquestionably a war in 1866. I gave you the statement of it when I said that we had violated our promise to Red Cloud's Ogalalas by attempting to open what is known as the "Bozeman road" through the lands of the Ogalalas.

Mr. HACKNEY. Yes; we brought that on by our act.

Mr. ROBESON. We brought that on by our act, and I state to you that our troops were whipped by the Indians; it is the only instance in which the Indians ever got the better of us, and we knew our cause was unjust and receded from the position at the instance of Gen. William T. Sherman; and the Bozeman road was not opened until suitable treaties were made there.

Mr. HACKNEY. Is that the only war that they had that you recognize as being a war?

Mr. ROBESON. No, sir; I will have to tell you that the first appearance ever made by Phil. Sheridan was against the Yakima Indians of Washington—that was the first time he ever appeared on the field. There was a war which occupied part of the years of 1864–65 with the Sioux and Cheyenne Indians.

Mr. STEPHENS. And Black Kettle's band, too, in Oklahoma—was that not a war?

Mr. ROBESON. No, sir; it was an outrageous murder by the United States. There was a war with the Navajo Indians when Carlton was commander of the United States troops, in 1863–64. There were at that time numerous engagements between the Navajoes and the troops of the United States. There was a war with a part of the Nez Percez tribes under the lead of Chief Joseph. We brought it on. Chief Joseph refused to sign away, as he expressed it, "the graves of his fathers," and we drove him away. There was the Modoc war. There was a short period of hostilities with the Modocs when they treacherously slew General Canby in the lava beds in Idaho, but we hanged the prisoners we took.

Mr. STEPHENS. And Custer's defeat by the Sioux?

Mr. ROBESON. That was a war, and it was one in which the United States ought to have been most severely punished. When a man speaks of the massacre of Custer's command, as much as any of us may regret it, I always feel like speaking out and saying that there was no massacre about it. He was killed in fair battle. We had given the Indians the Black Hills, and we had promised them that they might always live there unmolested. Our people went there and discovered gold, and one of you who sits here now was in that country when gold was discovered, and was a gallant officer of the Army at that time, and he knows, and all of us who have read the history of the time know, that our prospectors went there and overran that country. Custer was sent there and attempted to take those people out, but it was a never-ending wave that came back, for as fast as those people were driven out away from the reservation at one point they would come back into it at another. It is all right; it was one of the inexorable demands of civilization. The gold was there and we were going to have it if we crushed the Indian, and we crushed him, or tried to.

The CHAIRMAN. Mr. Robeson, this is very interesting, but that has practically nothing to do with this matter.

Mr. ROBESON. I was asked to enumerate some wars.

The CHAIRMAN. Yes; but you went on to enlarge upon that statement.

Mr. PEYTON. Will you let me make a suggestion, that in none of these wars was there ever by the United States an abrogation of any of the treaties with the Indian tribes?

Mr. HOWELL. Do you regard the war in Utah in 1866 and 1867 with Black Hawk and his band as a war?

Mr. ROBESON. Not by any means, because the tribes from which Black Hawk's band was recruited were always in amity with the United States. The Ute Indians in 1865 and 1867 were friendly in Utah just as the majority of them were in 1879 when Thornburgh was killed.

Mr. HOWELL. It took almost the entire militia to protect the settlers against Black Hawk and his band.

Mr. ROBESON. Yes, sir; they raided from Provo down to the southern border of Utah, east and west, and committed many depredations, but that band sometimes numbered 20 persons, and never at any time did it exceed 100. The Court of Claims has written a very interesting opinion regarding the operations of that band; but it could not be called a warlike body, because it was, as I have said, made up of renegades taken from tribes which were at the time in amity with the United States.

Mr. HOWELL. Was not the engagement with Geronimo a war?

Mr. ROBESON. No; he had Indians there of several different tribes which were in amity with the United States.

Mr. HOWELL. You mean the San Carlos Indians?

Mr. ROBESON. Yes, sir; the San Carlos Indians. Several tribes of Indians had been taken to the San Carlos Agency.

The CHAIRMAN. Mr. Robeson, let me suggest that the five minutes you asked for have now nearly extended into fifty.

Mr. ROBESON. May I have but a moment in which to conclude?

The CHAIRMAN. Certainly.

Mr. ROBESON. There are in my office and in the offices of Messrs. King & King and Isaac R. Hitt perhaps 5,000 cases.

Mr. THOMPSON. You do not mean that there are 5,000 which would be reinstated?

Mr. ROBESON. Certainly not, for among those 5,000 cases are included those which have gone to judgment, either for claimants or defendants, those which have been dismissed for various reasons, as for want of sufficient evidence or for failure to prosecute.

Mr. STEPHENS. What I want to get at is how many cases would be affected by this law; how many will be restored and put on the docket.

Mr. ROBESON. Not more than 2,000 cases.

Mr. STEPHENS. And what would be about the average amount that is carried in those cases?

Mr. ROBESON. Less than $1,000. The average is down now to $1,045.

Mr. HACKNEY. I would like, with the consent of the chairman, to make clear that statement about 5,000 cases. You meant one thing, Mr. Robeson, and I had in mind, as did Mr. Stephens, another.

Mr. ROBESON. What I mean to say is that the three firms referred to have handled altogether nearly half the cases originally filed. Twenty-five hundred of these have been disposed of in one way or another. There are not over 500 of that 5,000 which will go to judgment unless the law is amended. There are not more than 2,000 of all cases represented by all attorneys which will go to judgment if the law is amended as attempted in this bill. Estimating that there will be about 2,000 cases restored, and that the amounts claimed in those cases will be $3,000 on an average, we would have an aggregate amount claimed of about $6,000,000. If the difficulty in securing the testimony continues, as it will certainly do, we will recover about one-fourth of the amount claimed; so that there will be much less than $2,000,000, in my judgment, which will be charged to the United States by reason of the reinstatement of these cases. Six years ago my mail brought fifteen or twenty letters a day regarding Indian depredations cases. I do not receive that many letters regarding them now in two weeks, simply because our clients are dead, their witnesses are dead or scattered to such remote places that we can not discover

them, and we can therefore no longer secure testimony. It therefore becomes more difficult as the years pass to prove a claim. And any statement here regarding the probable amount of the increased liability of the United States must be modified and qualified by that condition. I believe that in the number of cases now on the dockets susceptible of judgment the aggregate will not exceed $800,000.

Mr. STEPHENS. Mr. Robeson, I believe you made a statement in 1904 in this matter. Will you please examine this paper [handing Mr. Robeson a paper]?

Mr. ROBESON. Yes, sir; I made a statement in 1904 which is entirely too liberal, and I believe the statement made by the Attorney-General is likewise too liberal, inasmuch as it slightly exceeds mine. At that time, 1904, the amount claimed in the cases then pending was $22,000,000, and since then the United States has dismissed about 2,500 of the cases.

Mr. STEPHENS. Would any of those be reinstated?

Mr. ROBESON. Some of those would be; yes, sir. A great many of those cases have been dismissed for want of prosecution. Parties did not prosecute because they did not have their witnesses. Those cases would not be reinstated. Some of the cases in which motions were made for dismissal for want of prosecution were doubtless affected by the decisions on amity, and for that reason the claimants have not taken testimony. So it is possible that some of the cases dismissed for want of prosecution will be reinstated, but those dismissed under the rule of court for that reason will not be reinstated by this act.

The judgments of the Court of Claims at this session are 50 in number, and the amount of the judgments is $55,000. As we have given our personal attention to the taking of testimony in those cases in Texas and in various sections of the country, I believe that the total liability of the United States by reason of the reinstatement of the cases for any of the reasons I have given here and the removal of these requirements which we seek to remove by this bill will not exceed $2,000,000.

I wish to say to the committee, in conclusion, that I am here to represent a people who have done their part in bearing the burdens and the cares of citizenship in the United States. There is not a State west of the Mississippi, with the exception of Iowa and Wisconsin, whose citizens are not interested in the passage of this act. There is not a State whose citizens will be benefited by the passage of this act that does not contribute more in one year to the payment of pensions by the Government than it will receive in six or eight years from Indian depredations if you amend this law in all the particulars I have suggested. We pension the people who served in the Army. These people who have given us equally as good service, and as great service, and service of as much benefit to the United States, are here, not asking for any pension or bounty, but are asking you to pay them for the property they lost. They say that you did not tell them when the Indians were hostile and they could not remove their property; they did not know when the Indians were hostile, because one Indian looked like another, and the condition of the Indians at one time was practically their condition at another time.

Now, I say that these people are here asking reimbursement for property actually taken or destroyed. We are denying it to them

upon a hypercritical, technical proposition, that if we give them this money we will violate that ancient and honored principle of the Government that we will not pay damages occasioned in time of war.

At the request of a member of the committee I have prepared a brief of this argument, which I ask may be attached at its conclusion.

I am obliged to the committee.

STATEMENT OF HON. JOHN G. THOMPSON, OF THE DEPARTMENT OF JUSTICE.

The CHAIRMAN. The committee, Judge Thompson, would be very much obliged if you will give it any information that you have that would assist us in arriving at a proper determination of this subject.

Mr. THOMPSON. Mr. Chairman and gentlemen, this subject, as you have learned from the discussion of it, is one about which many arguments can be presented on both sides. This committee has heard so much about it that I am sure it is reasonably familiar with the subject, and I do not intend, unless the committee desires it, to go into any extended argument. Since I have been connected with the Department of Justice it has been the policy of the Department to furnish the committee all information that it has, or at least such as the committee desires, upon any subject, leaving the rest to the legislative discretion.

The application for relief is founded very largely upon the promise of the Government eventually to indemnify citizens or inhabitants for loss of property taken by Indians. The first of these statutes was passed in 1796, and there have been various statutes since then concerning this subject, from 1796 to 1834.

In 1859 the United States, by an act of Congress, provided that it should not be liable for depredations of Indians committed after that time, but did not repeal its liability as to depredations committed before that time. Then, from 1859 until 1891, when the present act was passed giving the Court of Claims jurisdiction over these claims, there was no liability on the part of the United States. That act of 1891 gave to the Court of Claims jurisdiction to hear and determine and render judgments in these cases against the United States and the Indian tribe where it could be ascertained, and assumed liability for the depredations that had been committed from 1859 to 1891.

Now, in all of those statutes that were passed the United States said to the citizen, or to the inhabitant, that it would eventually indemnify him for the loss of property taken by Indians, but did not promise to indemnify for loss of property taken by Indians in time of war; that is to say, every statute that was passed provided that they would eventually indemnify the citizen or inhabitant for any property taken by any Indian tribe in amity with the United States. That was the original promise of the Government.

So that we come down, it seems to me, to the pure question of whether or not this committee wants to recommend a bill to Congress, or whether or not the Congress wants to pass a bill reversing the policy of the Government during all of that time.

Mr. STEPHENS. What would be the difference in the claims if we put in that word "amity;" that is, in amount or number of claims and amount of money?

Mr. THOMPSON. I am coming to that in a moment. I was speaking of the other matter, so that if the committee did not already understand it, it would understand it. The theory of all these statutes requiring amity was that a nation under the well-settled rules of international law did not pay for property taken or destroyed in time of war.

Coming to the question of the requirement of citizenship, the old statutes were different from the new in that all of the earlier statutes provided for indemnification to the citizen or inhabitant, while the act of 1891 limits the right of recovery to a citizen of the United States, thereby cutting off the inhabitant who was not a citizen from recovery.

Mr. ROBESON. The word "band" was not in the old statutes, was it?

Mr. THOMPSON. No; the word "band" was first used in the act of March 3, 1891.

Mr. THOMPSON. When I was before this committee nearly four years ago I estimated that striking out the word "amity" where the Indians were hostile at the time, would result in the payment by the United States eventually of an additional $5,000,000, not in amount claimed but in the amount that would actually go to judgment. At that time it was very largely a guess, and had to be an estimate. Since that time this work has progressed until practically 80 per cent—I guess a little more than 80 per cent—of the total number of cases have been disposed of. We keep a judgment docket in which is recorded every case that is disposed of, showing whether or not it went to judgment against the United States, and what Indians, and for what amount, and, where it was dismissed, showing the amount of the claim and for what reason it was dismissed.

Now, taking the judgment docket to-day, with 80 per cent of the cases disposed of, and there have been dismissed for want of amity in amount claimed (that would not be the amount that would go to judgment, but in amount claimed), there have been dismissed $7,942,000. That is, in round numbers, $8,000,000 have been dismissed up to this time for want of amity where it is shown on the judgment docket. In addition to that a great many cases, some 2,000, have been dismissed for want of prosecution. Unquestionably in those 2,000 cases are a number of cases where the reason that they were not prosecuted was because the court had held that the Indians were not in amity, and consequently the claimant took no further action in the matter, and they were dismissed for want of prosecution.

Mr. STEPHENS. That class of cases, then, would be restored to the docket by this bill?

Mr. THOMPSON. Yes, sir.

Mr. STEPHENS. How much would that amount to?

Mr. THOMPSON. We have estimated that that particular item would probably amount to a million dollars in amount claimed. Of course, in giving these amounts, do not get it confused with the idea that there would be judgment for that amount, but that is the amount in the petitions. In addition to that there are a number of cases that have gone to judgment where there would be, for instance, two or three items—two or three depredations in the same petition, but of different dates. Perhaps one or two of them came in a period

when the Indians were hostile, and the others came when the Indians were not hostile, and that particular item in the petition went to judgment; the other two items in the petition were dismissed for want of amity, but that is not shown on our judgment docket, and of course that would enter into it. We have estimated the best we can that that would probably amount to a million dollars in amount claimed. Then there are still remaining on the dockets, undisposed of, in the neighborhood of 2,200 cases. Among those cases there are unquestionably cases that would be affected by the defense of want of amity, just how many it is impossible to tell; but we have thought a moderate estimate of that, in the amount claimed, would be a million dollars, there being some $7,000,000 undisposed of, making the total of the amount claimed by the claimants that would probably be affected by amity, and would be restored to the jurisdiction of this court by this legislation, $11,000,000—that is, in amount claimed.

When I was here four years ago I estimated that one-third—probably one-third, or 40 per cent of the total number of claims—failed, which would have made $15,000,000 in amount claimed, and which we then estimated would result in $5,000,000 for judgments. With this additional information that has come to us from the disposal and dismissal of these cases, we would have to start out with $8,000,000 already disposed of, so we can get much closer to it than we did before.

Mr. STEPHENS. Eight out of eleven?

Mr. THOMPSON. Yes, sir; eight out of eleven having already been dismissed. So I have estimated, taking the same percentage if each case went to judgment, the same percentage of the amount claimed, that would make this estimate result in judgments against the United States if this law is passed, and these cases are reinstated, amounting to $3,750,000, that, of course, upon the assumption that all these cases in which $11,000,000 was claimed would go to judgment. That would not be true. They would not all go to judgment, because some of them would fail for want of proof, and that far it would reduce the per cent; but on the other hand in that $8,000,000 claimed in the cases there is an item of probably $500,000 in these allowed cases that you have been hearing about in this hearing. Those were cases that were investigated by the Secretary of the Interior and allowed by him, and in almost every instance he allowed the claim for a very much less amount than was originally claimed in the petition.

Now, unless we reopen that case, or unless the claimant reopens it, if this defense of want of amity is taken away and they are reinstated, they would go to judgment just as soon as they could be presented to court for the amount allowed by the Secretary of the Interior, and if none of them are reopened they would go to judg- a little less) very soon. That would bring up the percentage somement for $500,000 (I would say possibly a little more; it might be what. Then there are quite a number of cases—just how many it is impossible to say—but quite a number of very good cases and quite large cases that were well proved before the court decided that at the particular time this property was alleged to be taken, these Indians were not in amity. So that those cases being very well proved now, will probably be ready for trial and there probably will be no difficulty in getting the evidence in those cases. So they would probably run to a pretty large per cent, and of course in connection with

that it is only fair to say that the time, in these cases that have been dismissed for want of amity, and with the time going along ten or fifteen years, witnesses have died, and it is much more difficult to get evidence for the claimant or the defense even, for that matter, than it formerly was.

So that in estimating that we simply have to average that up, and the conclusion we have come to in the office is that, taking into consideration these allowed cases and taking into consideration quite a large number of pretty large cases that are already proven, it would result in a pretty large per cent of the amount claimed, and probably the estimate of $3,750,000 would be pretty close to the amount of money judgments that would be rendered against the United States in the long run.

Mr. STEPHENS. In making that estimate do you take into consideration the amount that would be recovered if the "inhabitant" clause is changed as provided for in this bill?

Mr. THOMPSON. No, sir. Coming now to the question of citizenship, there have been dismissed for want of citizenship some 300 cases, involving considerably more than a million dollars, and $200,000 of that, or about $200,000, were claimed by the Indians against the United States. Four years ago, before the committee, I estimated that striking out the word "citizenship" and giving inhabitants the right to recover, would probably increase the liability of the Government $500,000. I do not see any particular reason to change that; we have had, that I can see, no reason to change it. As the committee understands, of course it is an estimate and considerably of a guess, but in any event there would be restored to the docket in amount claimed considerably more than a million dollars on the question of citizenship.

The CHAIRMAN. May I ask you there if you see any special reason why, assuming that we should pay the citizens, that we should pay the inhabitants?

Mr. THOMPSON. Well, it would only be upon the theory—or at least it would be largely upon the theory—that the original statutes were original promises of the United States of indemnity—promised indemnity to the inhabitant as well as the citizen.

The CHAIRMAN. That is the promise that was abrogated in 1859?

Mr. THOMPSON. No; they did not abrogate that promise, as I understand, in 1859; they simply provided in 1859 that from that date the United States would no longer be liable for Indian depredations.

Mr. ROBESON. To citizen or inhabitant?

Mr. THOMPSON. To anyone from 1859. Congress did not take away the liability of the Indian, but provided that after that date the United States would not be further liable, and that condition existed until 1891, when Congress enacted the present law, which assumed liability for the depredations that had been committed from 1859 down to that date.

The CHAIRMAN. What proportion of those claims is founded upon depredations made prior to 1859?

Mr. THOMPSON. Less than 10 per cent.

Mr. MORSE. There is no question of a promise to pay, but there would be no moral liability on the part of the Government for any depredation or for damages or depredations after 1859, would there?

Mr. THOMPSON. Not except the statute of 1891.

Mr. MORSE. Which was retroactive in a way?

Mr. THOMPSON. It was retroactive; yes, sir—back to 1859 and from that time on, there being no liability in the meantime.

Mr. ROBESON. Judge, may I call your attention to the fact that the Court of Claims has held, and the Supreme Court has affirmed the finding, that the liability of the United States is traceable directly back to the trade and intercourse act of June 30, 1854; that there is the basis of the liability of the United States.

Mr. THOMPSON. Yes, sir; they have decided that, and that, to some extent, might affect the question asked just now, and it perhaps would not be correct to say that there was no moral reason why they should not do it from 1859 down, but, as a matter of fact, from 1859 to 1891 there was no legal liability on the part of the United States for claims that accrued, or at least for depredations that accrued, during that period.

Mr. STEPHENS. As a matter of fact, have not the Indians been more hostile on the frontier since the civil war—that is, during the period of the civil war—than they were before? I know it has been so in my country for several years.

Mr. THOMPSON. There is no question in my mind that about the commencement of the civil war, and for a number of years thereafter, there was a very hostile period.

Mr. STEPHENS. It was at a time when the soldiers were withdrawn, thereby giving the Indians a chance to go on the warpath successfully, and after they had once tasted blood and engaged in plunder it was a hard matter to do anything with them.

Mr. HOWELL. What machinery did the Government employ in settling those Indian depredation claims prior to 1859? Did they come direct to Congress?

Mr. THOMPSON. I think they came direct to Congress before that. How about that, Mr. Robeson?

Mr. ROBESON. They came direct to Congress. The Secretary was not put in charge of them until after that time.

The CHAIRMAN. Judge, do you care to state, and if so, what do you say as to the moral or legal obligations of the Government to pass such a statute as is here requested?

Mr. THOMPSON. Personally, I would be pleased to answer that, but I do not know that I ought to make a statement on that proposition.

The CHAIRMAN. I do not ask you to make it if you would rather not.

Mr. THOMPSON. The only objection I have to doing it is that I know it has been the policy of the Department not to give opinions upon a matter of what Congress should do or should not do.

Mr. STEPHENS. Has this bill been submitted to the Department?

Mr. THOMPSON. I have had a copy of the bill. The committee, after the bill was printed, by some mistake, sent it to the Commissioner of Indian Affairs, and after working over it for several days they came over to see me about it.

The CHAIRMAN. It was my intention to have it sent direct to you.

Mr. THOMPSON. Yes, sir; I have had this bill for plenty of time to look it over.

The CHAIRMAN. But you are not here advocating its passage.

Mr. THOMPSON. No, sir; by no means.

The CHAIRMAN. Its passage would mean a prolongation of the work which you now have in hand, as the head of, would it not?

Mr. THOMPSON. Yes, sir.

The CHAIRMAN. How large a force is now employed by you—or I will put it in another way—how large an appropriation have we been making in late years for the continuance of the work under your charge?

Mr. THOMPSON. The appropriations for several years after I came here was $52,000 a year. For some two or three years during that time I did not use all of the appropriation. Then it was reduced at my suggestion to $40,000 a year, I think, and I am now using about $35,000 a year. Between $30,000 and $35,000 a year is all the appropriation that is made in defense of these claims.

The CHAIRMAN. Without a modification of the statute, when do you see an end to the present work?

Mr. THOMPSON. The next two years, at the farthest, ought to see this work so far completed that it will not be necessary to have it in charge of any particular bureau. Of course, there will be scattering Indian depredation claims in the absence of the amendment of the statute for a number of years. They will probably have to be placed in the charge of some man who will investigate them and try them as they come along, but the work, so far as it pertains to the work of the Bureau, or a particular division, will end inside of the next two years, unquestionably.

The CHAIRMAN. Is it now a bureau of Indian depredations of which you are the head?

Mr. THOMPSON. Yes, sir.

The CHAIRMAN. In the Department of Justice?

Mr. THOMPSON. Yes, sir.

Mr. PEYTON. Mr. Chairman, may I ask a question?

The CHAIRMAN. If Judge Thompson is willing.

Mr. THOMPSON. Certainly.

Mr. PEYTON. Has there ever, since this act was passed, been any amendment to the act at all by Congress?

Mr. THOMPSON. No, sir; I think not.

The CHAIRMAN. The act of 1891, you mean?

Mr. PEYTON. Yes, sir; the act of 1891.

Mr. THOMPSON. I have a tabulated statement here of the condition of the business, and I can either read it to the committee or give it to the stenographer.

Mr. STEVENS. Mr. Chairman, would there be any objection to its being printed?

The CHAIRMAN. No; all of these hearings will be printed as soon as possible.

Mr. THOMPSON. I have one statement here showing the amount of work that has been done, in other words, the number of cases that have been disposed of from the time the act of 1891 went into effect down to November 1, 1907; that was November after the June when I took charge of the work. Then I have another statement showing what has been accomplished in the matter of the disposition of cases from November 1, 1897, to November 1, 1907. Then I have a further tabulation of the condition of the entire work at the present time, showing the number of cases filed, the amount claimed, the number of judgments, and the total amount of judgments, and the number of

cases left. I will hand this to the reporter, and he can insert it in the record.

(The statements are as follows:)

Figures to November 1, 1897.

Number of cases acted upon	1,241
Amount claimed in such cases	$5,430,883.23
Judgments for claimants	681
Amount claimed in such cases	$2,578,281.11
Amount of judgments for claimants	$1,374,710.71
Judgments for defendants	560
Amount claimed in such cases	$2,852,602.12

Since November 1, 1897.

Number of cases acted upon	7,458
Amount claimed in such cases	$31,100,159.43
Judgments in favor of claimants	2,289
Amount claimed in such cases	$9,499,282.17
Amount of judgments for claimants	$3,483,181.09
Judgments in favor of defendants	5,169
Amount claimed in such cases	$21,600,877.26
Total number of cases filed	10,841
Amount claimed	$43,515,867.06
Cases in judgment	8,699
Amount claimed	$36,531,042.66
Judgments in favor of claimants	2,970
Amount claimed	$12,077,563.28
Amount of judgments	$4,857,891.80
Judgments in favor of defendants	5,729
Amount claimed	$24,453,479.38
Judgments for year ending November 1, 1907	50
Amount claimed	$184,276.50
Amount judgments	$55,114.00
Judgments for defendants same period	490
Amount claimed	$1,739,381.05
Cases now pending	2,142
Amount claimed	$6,984,824.40

The CHAIRMAN. May I ask you generally since the act of 1891 how much the United States has paid in discharge of the Indian depredation claims?

Mr. THOMPSON. The total amount of judgments that have been appropriated for from the time the act went into effect down to the present time is $4,857,891.80. Whether or not those judgments have all been paid I do not know, but I assume that most of them have.

The CHAIRMAN. And in the meantime there has been appropriated for the conduct of the bureau about three-quarters of a million of dollars from what you have said.

Mr. THOMPSON. I do not think I know what the appropriation was for the first three years. The appropriation for about five years, as I remember it, was $52,000 a year. Since then it has run considerably less, in sixteen years.

The CHAIRMAN. Well, it is upward of half a million dollars.

Mr. THOMPSON. I should think it would be about that.

The CHAIRMAN. During that period how much less was recovered than was claimed?

Mr. THOMPSON. Very much less. The cases that have gone to judgment since the act went into effect number 8,699—that is, cases that have been finally disposed of. The amount claimed in those cases,

8,699 in number, was $36,531,042.66. Of these judgments the claimants were successful in 2,970 cases. In those cases there was claimed $12,077,563.28. In those cases they recovered judgments for $4,857,891.80. The judgments for the defendants of that entire amount—those were cases in which the Government was entirely successful—numbered 5,729, and the amount claimed in those cases that were decided in favor of the Government and were dismissed was $24,453,479.38. That was the condition down to the 1st of last November.

The CHAIRMAN. Well, summarized, that is practically this: That of the cases prosecuted since the passage of the act of 1891, one-third have made recovery and in two-thirds there have been judgments for the defendant; and in the one-third of the cases where there was a recovery, one-fourth of the amount claimed was recovered.

Mr. THOMPSON. About one-third of the amount claimed.

The CHAIRMAN. Yes; about one-third.

Mr. THOMPSON. Not quite one-third. Now, there is a matter in this bill that I want to call the attention of the committee to, and I think Mr. Robeson will agree with me on this proposition. This first section of the bill reads, "All claims for property of citizens of the United States or inhabitants thereof." Now, lately, or within the last few years, Congress has made citizens of the Indians living in the Indian Territory, and they are as much citizens, legally, now, as anyone else. They had filed claims to the extent of $200,000 or $300,000 against the United States where the property was sometimes taken by the other Indians—I mean Indians of other tribes—and sometimes Indians of their own tribes, and the Indians are liable there only in case there is a treaty which provides for their payment, and sometimes those claims are laid before the Secretary of the Interior; and unless the committee in reporting this bill wants to provide that these Indians who had formerly had tribal relations shall have the right to recover it, or to make the exception there of Indians who have heretofore had tribal relations, it should be eliminated. I do not think that that was put in with the idea of including those Indians, but I think it would.

Mr. ROBESON. I perfectly agree with you.

Mr. STEVENS. What suggestion would you make of an amendment to cover that?

Mr. ROBESON. "Excepting those Indians in tribal relations."

Mr. THOMPSON. I have made the change here, "excepting Indians heretofore having tribal relations."

The CHAIRMAN. Were the Five Civilized Tribes citizens in 1891?

Mr. ROBESON. No, sir; not until 1901.

Mr. THOMPSON. Then there is another provision in the twelfth line of that first section where it provides that, "or shall hereafter become citizens of the United States; taken or destroyed within the limits of the United States by Indians belonging to any tribe or nation subject to the jurisdiction of the United States." That provision, "within the limits of the United States," would probably give the right to a citizen or an inhabitant to recover for property taken when he was unlawfully within the Indian country. Now, he can not recover if he was a trespasser upon an Indian reservation or had no legal right to be there and lost his property. That provision would

probably give him the right to recover, notwithstanding the fact that he had wrongfully gone into that country.

The CHAIRMAN. Judge Thompson, will you be kind enough to write us a letter calling our attention to these facts and suggesting the amendments that occur to you?

Mr. THOMPSON. I will be very glad to do it.

Mr. ROBESON. I agree with that, Judge Thompson.

Mr. MORSE. I would like to ask a question, and I do not know whether I am asking a proper question, but I would like to ask if these contracts between attorneys and claimants are submitted to either the Department of Indian Affairs or the Department of Justice for confirmation.

Mr. THOMPSON. Oh, no; the act of 1891 provides that the court shall allow the fee.

Mr. ROBESON. And it makes it most ridiculously small.

Mr. HOWELL. Does that preclude the right of a citizen to contract with an attorney to represent him in the Court of Claims?

Mr. ROBESON. It does not.

Mr. HACKNEY. What is the effect of that provision then?

Mr. ROBESON. It avoids all former contracts before the act was passed. Some contracts were exorbitant, and the act of 1891 avoids those contracts. After that time claimants might contract. The court is authorized to fix a fee of 15 per cent except where unusual services have been rendered or expenses incurred, in which case they allow 20 per cent. May I be pardoned for saying to the committee that cases could not be prosecuted for a fee of 15 per cent, because the expenses of prosecution are so very considerable that they consume a 15 per cent fee.

Mr. STEPHENS. Is the amount of the fee stated in the judgment?

Mr. ROBESON. Always, and a judgment is rendered in favor of the attorney out of the proceeds.

Mr. SAUNDERS. Do you understand that counsel can contract under the present law and that is subjected to the ratification of the Court of Claims?

Mr. ROBESON. No, sir; that does not go to the court. These claimants are all poor and can not pay their expenses—that is, the average claimant—and therefore the attorney has to pay the expenses himself, sometimes even for the attendance of witnesses. The court can allow 20 per cent. I will say to you frankly that it is my custom to take an extra contract for 5 per cent. If I get the court to allow me 20 per cent, I get 25 per cent; if 15 per cent, I get 20 per cent, and that 20 per cent allowance includes the cost of printing. We do not get paid for printing in a case that we lose, and we lose in a great many cases where it is necessary under the rule of the court to print.

Mr. THOMPSON. Inasmuch as the committee has asked me to write a letter suggesting some amendments, I do not know of anything further that I want to say unless some member of the committee desires to ask some question.

Mr. STEPHENS. I hope you will write that letter, Judge, because it will put the matter in better shape for the committee.

The CHAIRMAN. If no member desires to interrogate Judge Thompson, we will consider the hearing closed.

(There being no further questions, the committee adjourned.)

BRIEF OF WILLIAM H. ROBESON, ESQ., IN SUPPORT OF THE BILL.

The first act with reference to Indian depredations provided "eventual indemnification" to any citizen *or inhabitant* of the United States for property taken, stolen, or destroyed by Indians. (1 Stat. L., 472, sec. 14.)

A similar act was passed in March, 1799 (1 Stat. L., 747, sec. 14); another, March 30, 1802 (2 Stat. L., 143, sec. 14).

These several acts were embodied in the trade and intercourse act of June 30, 1834. (4 Stat. L., 731, sec. 17.) This act provided for reimbursement to any citizen *or inhabitant* for losses occasioned by Indians, and that the owner or his representatives might make application to the superintendent, agent, or subagent, who should, under the direction of the President, make application to the nation or tribe to which the depredating Indians belonged. And it was provided if the Indians did not make satisfaction such further steps might be taken as should be proper in the opinion of the President, "and in the meantime, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the parties so injured an eventual indemnification."

The guaranty of eventual indemnification by the United States was repealed by the act of February 28, 1859. (11 Stat. L., 401, sec. 8.) The remaining portions of the act, continuing the liability of the Indians, is embodied in section 2156 of the Revised Statutes.

The act of May 29, 1872 (17 Stat. L., 190, sec. 7), authorized the Secretary of the Interior to publish the necessary rules and regulations and prescribe the manner of presenting the claims under existing laws or treaty stipulations for compensation for depredations committed by Indians. It authorized an investigation by the Secretary of such claims as might be presented, by citizens *or inhabitants*, and directed a report to Congress annually of the nature, character, and amount of such claims, whether allowed by him or not, and the evidence upon which his action was based.

The act of March 3, 1885 (23 Stat. L., 376), authorized the Secretary of the Interior to make a complete list of all such claims filed in his Department, approved in whole or in part, and also of such claims as were pending but not yet examined, chargeable against any tribe by reason of any treaty between the tribe and the United States, which he was to report to Congress, after making such additional investigation and securing such further testimony as he might deem necessary to enable him to reach a determination.

The act of March 3, 1891 (1 Supp. R. S., 913), provided in its first section that the Court of Claims should have jurisdiction to adjudicate—

1. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause of provocation by the owner or agent in charge and not returned or paid for.

From this these things result:

1. The necessity of citizenship.
2. The necessity of a state of amity.

And from the decisions of the courts these:

1. Citizenship relates not to the time of the passage of the act, nor to the time of the filing of the petition, nor to the time of the judgment, *but to the date of the depredation*. (Valk *v.* U. S., 29 Ct. Cls., 62; Contzen *v.* U. S., 179 U. S., 191.)

2. A band of a tribe in amity may be hostile, and its hostility will authorize the court to deny judgment. (Connors *v.* U. S., 180 U. S., 271; Montoya *v.* U. S., 180 U. S., 261.)

3. "In amity" means "relations of actual peace." (Marks *v.* U. S., 161 U. S., 297; Leighton *v.* U. S., 161 U. S., 291.)

This bill, No. 11316, provides:

1. A recovery for inhabitants.

2. For the elimination of the word "band."

3. For the elimination of the requirement of amity.

The word "inhabitants" is used in every act providing indemnification or authorizing payment until the act of March 3, 1891, conferring jurisdiction upon the Court of Claims. The promise of these acts has always been made to inhabitants as well as to citizens.

The same reason which impelled Congress to promise "eventual indemnification" to citizens would likewise have moved it to a similar promise to bona fide inhabitants. The reason was that Congress desired the settlement and development of the western country, and it offered to those within its jurisdiction, whether citizens or not, such guaranty of protection as is found in a promise of eventual indemnification. In this work of development the inhabitant could, and did, render as much service as the citizen.

Again it has been found that a number of claimants supposed that their service in the Army of the United States perfected their citizenship; others relied upon a declaration of their intention to become citizens. It is seldom that a noncitizenship case is found in which it does not appear that the claimant, under a misapprehension of his rights, has exercised and enjoyed the privileges of citizenship.

The word "band" has no business in the act of March 3, 1891. It was not in the act as agreed upon by the conference committee and reported to both Houses of Congress, though it appears in the bill as engrossed.

Nor was it ever in any act relating to Indian depredations until it was written into this act of March 3, 1891.

If the word "band" was properly inserted in this act, it was surely the intention of the framers of the bill that there should be a recovery for Indians belonging to any aggregation, whether that aggregation was known as a "band," a "tribe," or a "nation"; but, as shown, the courts have held that a band of a tribe may be hostile and that judgment will be denied, though the tribe to which it belonged was in amity.

This construction of the word "band" in the act produces an effect which violates also the promise of Congress contained in the previous acts on the subject, where only the word "tribe" is used.

This bill removes the requirement of amity.

It is true that all the acts from 1796 down to and including the present jurisdictional act provide for reimbursement for depredations committed by Indians only when the tribe was in amity.

The difficulty is not so much with the requirement as it presents itself to the average mind, but with the hypercritical technicality

with which the court has considered it in defining the meaning of the words.

Ordinarily a tribe might be said to be in amity when it is not at war, and, notwithstanding the decisions of the courts, a broad and liberal construction of this term, such as should be given to a remedial statute, would render impossible any status between one of war and one of amity. But the courts have decided that the term means "in relations of actual peace." And in following this definition they have made these declarations:

1. The existence of a treaty and continued recognition of the same by the executive department is not conclusive of a continuance of peaceful relations. (Love *v.* U. S., 29 Ct. Cls., 332.) There has never been the abrogation of a treaty with Indians on account of hostility, except in the case of the Sisseton and Wahpeton Sioux, who engaged in the massacre of 1862 in Minnesota; and in that case the abrogation of the treaty working a forfeiture of the annuities, Congress by a recent act restored the annuities, authorized suit to be brought in the Court of Claims to state the account of the annuities, and the Supreme Court on Monday, February 24, 1908, gave a judgment in favor of the Indians for about $800,000.

The decision above referred to (Love *v.* U. S.) disregards a long line of decisions to the effect that a long-continued departmental construction of an act, while not binding upon the courts, will be highly regarded by them in their own interpretation.

In the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect. (Hahn *v.* United States, 107 U. S., 402; Stuart *v.* Laird, 1 Cranch, 299; Martin *v.* Hunter, I Wheat., 304; Cohens *v.* Virginia, 6 Wheat., 264; Edwards *v.* Darby, 12 Wheat., 210; Union Ins. Co. *v.* Hoge, 21 How., 35; United States *v.* Alexander, 12 Wall., 177; Peabody *v.* Stark, 16 Wall., 240; Smythe *v.* Fiske, 23 Wall., 374; United States *v.* Moore, 95 U. S., 760; Cooper Mfg. Co. *v.* Ferguson, 113 U. S., 727.)

The construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons. (United States *v.* Moore, 95 U. S., 760; Brown *v.* United States, 113 U. S., 568.)

The Supreme Court said: "It is our duty not to overrule the construction of a statute upon which the Land Department has uniformly proceeded in its administration of the public lands, except for cogent reasons." (McMichael *v.* Murphy, 197 U. S., 304–312, citing United States *v.* Johnston, 124 U. S., 236; United States *v.* Alabama G. S. R. Co., 142 U. S., 615; United States *v.* Philbrick, 120 U. S., 52; United States *v.* Healey, 160 U. S., 136.)

In the case of Potter *v.* Hall the Supreme Court upheld a well-established rule of the Interior Department, saying: "And, as we consider that the rule thus applied in the practical administration of the statute by the officials by law charged with its execution conforms to its intention, we are unwilling to overthrow it by a resort to a narrow and technical construction." (189 U. S., 292–300.)

It has been decided that to constitute a want of amity it is not necessary that there have been engagements with troops (Allred, 36 Ct. Cls., 280; Luke, 35 Ct. Cls., 15; Painter, 33 Ct. Cls., 114); that

hostilities with settlers alone establishes a state of war (Marks *v.* U. S., 161 U. S., 297; Montoya *v.* U. S., 180 U. S., 261), and that the cause of hostility is immaterial, whether it be inaugurated by the Indians or by the United States, justly or unjustly (Leighton *v.* U. S., 161 U. S., 291).

The reason given for the insertion of the words "in amity" is that it is a well-established policy of nations not to pay for damages occasioned by the enemy in time of war, to which it is replied: That the policy referred to is one which prevails among independent sovereignties, but that the relations of the Indians to the United States being those of a ward to his guardian it is impossible that there should be a want of amity.

Chief Justice Marshall first declared that the Indian tribes in the United States are "domestic, dependent nations." (The Cherokee Nation *v.* Georgia, 5 Peters, 1.) In an opinion also by Chief Justice Marshall (Wooster *v.* Georgia, 6 Peters, 515) this declaration was reiterated; and in both it was declared "their relation to the United States resembles that of a ward to his guardian." No court has had the temerity to otherwise describe the relations between the United States and its Indian tribes, but in numerous cases these two decisions have been closely followed. (Holden *v.* Joy, 17 Wall., 211; Elk *v.* Wilkins, 112 U. S., 94; Eastern Cherokees *v.* U. S., 117 U. S., 288; U. S. *v.* Kagama, 118 U. S., 375; Stephens *v.* Cherokee Nation, 117 U. S., 445; Jones *v.* Meehan, 175 U. S., 1.)

Section 2 of the bill authorized an amendment of the petition at any time before judgment, so as to designate correctly the tribe by members of which the depredation appears to have been committed.

The present jurisdictional act (1 Supp. R. S., 914, sec. 3) provides that the petition shall name the "tribe or tribes or band of Indians by whom the alleged illegal acts were committed *as near as may be.*" And by section 5 (Ibid., 915) the court is to render judgment against the United States "and against the tribe of Indians committing the wrong, *when such can be identified.*"

The Court of Claims decided in the case of Duran *v.* United States (31 Ct. Cls., 353) that it would permit an amendment at any time. But in the recent case of United States *v.* Martinez (195 U. S., 469) the Supreme Court decided that unless the amendment was made before the expiration of the time in which suits might be brought the suit must be dismissed if the proof showed the responsibility of any other Indians than those named in the original petition.

The reason for the proposed amendment is that in nine cases out of ten, the depredations being committed at night, or not in the presence of eyewitnesses, no one could with certainty and accuracy identify the tribe to which the depredating Indians belonged.

This opinion of the court was dissented from by Justices White and McKenna, who could not reconcile it with any decision wherein the court had held that where the Indians were unknown judgment might be rendered against the United States alone. (Gorham *v.* U. S., 165 U. S., 316.)

Section 3 provides that where a petition has been filed by any party in interest, whether such party was the sole owner of the property or not, may, at any time, be amended by the substitution of all the parties in interest or by personal representatives.

Some years ago the court declined to permit an amendment of a suit brought by one heir, so as to bring in the other heirs, or an administrator of the estate. Later the heir or heirs who joined were permitted to recover their interests. Still later the court has permitted such amendment as would authorize all the heirs to join, or the substitution of an administrator. (Davenport *v.* U. S., 31 Ct. Cls., 430.)

The purpose of this section is to confirm the court in its last opinion.

The jurisdictional act does not extend to claims accruing prior to July 1, 1865, unless such claims had been pending prior to March 3, 1891, before the Secretary of the Interior or other body or official authorized to inquire into such claims; and it defines "pending" to mean that evidence *must have been presented therein.* (1 Supp. R. S., 914, sec. 2.)

The Supreme Court has held that the claim was not pending unless such evidence had been filed as was prescribed by the rules of the Secretary of the Interior. (Nesbitt *v.* Moore, 186 U. S., 153.) These rules require, first, the application by the claimant or his agent; second, the sworn declaration of the claimant, stating the tribe of Indians, describing fully the property stolen or destroyed and giving the quantity of each article, or number, condition, or quality thereof, and the just value of each article or piece of property at the time it was taken or destroyed; third, the depositions of two or more persons *having personal cognizance* of the facts stated in the declaration, who must also tell when, where, and by what Indians the depredation was committed, and of what the property consisted, and the value thereof.

These requirements of the Secretary were absolutely unreasonable, because, in most instances, it was impossible to comply with them; and on evidence less rigid than that required by the Secretary of the Court of Claims has rendered hundreds of judgments.

Section 4 of this bill is designed to overcome this difficulty and to authorize the court to adjudicate any claims which had been filed before the Secretary. Upon these points it is noted that the Court of Claims declines to render judgment upon affidavits filed with the Secretary, declaring that it gives but little weight to them. (Jones *v.* U. S., 35 Ct. Cls., 36.)

Section 5 of the bill provides for the reinstatement and readjudication of such cases as may have been dismissed by reason of want of citizenship, want of amity, failure to correctly designate the tribe in the original petition, lack of sole ownership, failure to comply, as to the claims accruing prior to July 1, 1865, with the rules of the Secretary. Upon this point the Attorney-General, writing with reference to a similar bill pending in the Fifty-sixth Congress, said:

> The effect of passing the bill without a provision for the reinstatement of cases which have been heretofore decided adversely to claimants on jurisdictional grounds would be to banish those claimants who have been diligent in producing proof and pressing their claims to a hearing. (S. Doc. 404, 53th Cong., 1st sess., p. 3.)

Hundreds of cases have been voluntarily dismissed by claimants for some of the reasons now sought to be removed, with the understanding and belief that in the event of an amendment of the law they should be reinstated.

Table showing the average amount claimed and the average amount of judgments, and the average per cent in the various years since the jurisdictional act was passed.

Year.	Average amount claimed.	Average amount of judgment.	Per cent.
1892	$3,706	$1,977	53.3
1893	4,021	2,263	56.2
1894	6,286	2,629	43.0
1895	4,129	2,377	57.5
1896	2,900	1,667	57.5
1897	2,811	1,463	52.7
1898	3,562	1,364	38.3
1899	4,324	1,914	44.0
1900	3,886	1,650	42.5
1901	5,607	1,670	29.8
1902	4,726	1,776	37.4
1903	4,368	1,446	33.5
1904	3,270	1,600	33.3
1905	4,080	1,270	30.0
1906	3,000	1,045	33.3
1907	3,680	1,100	30.0

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